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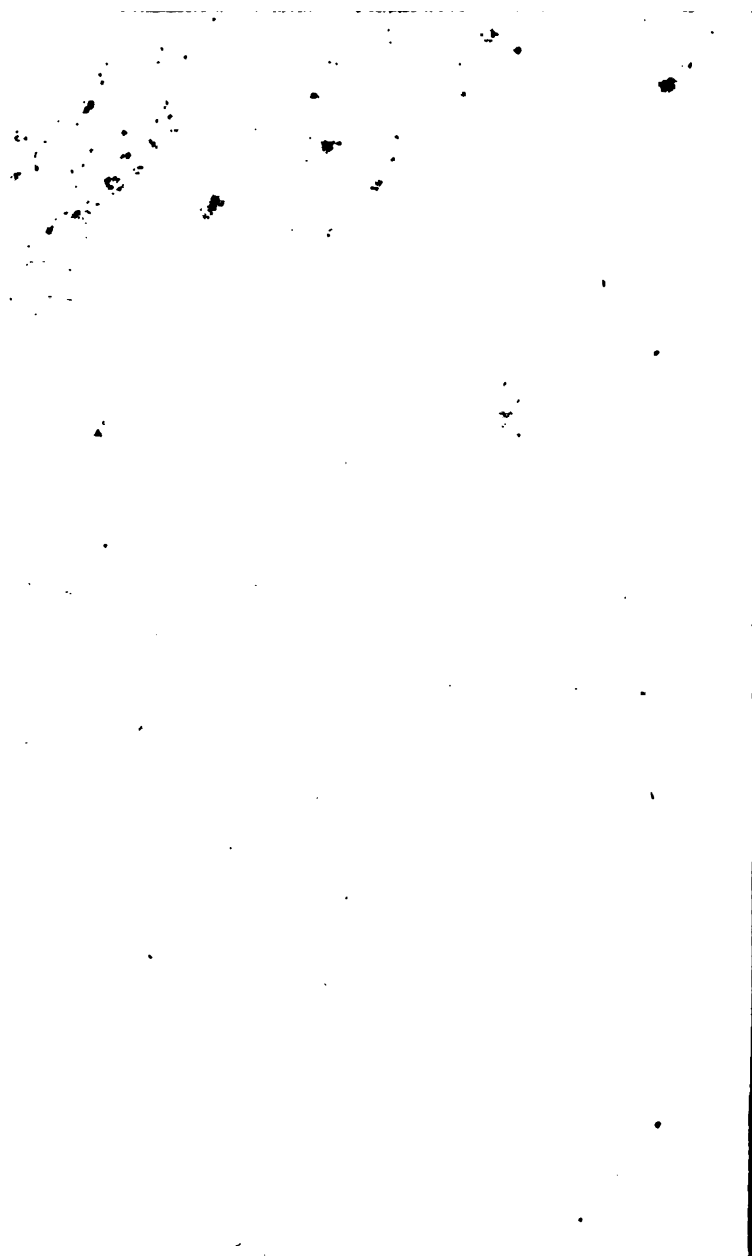
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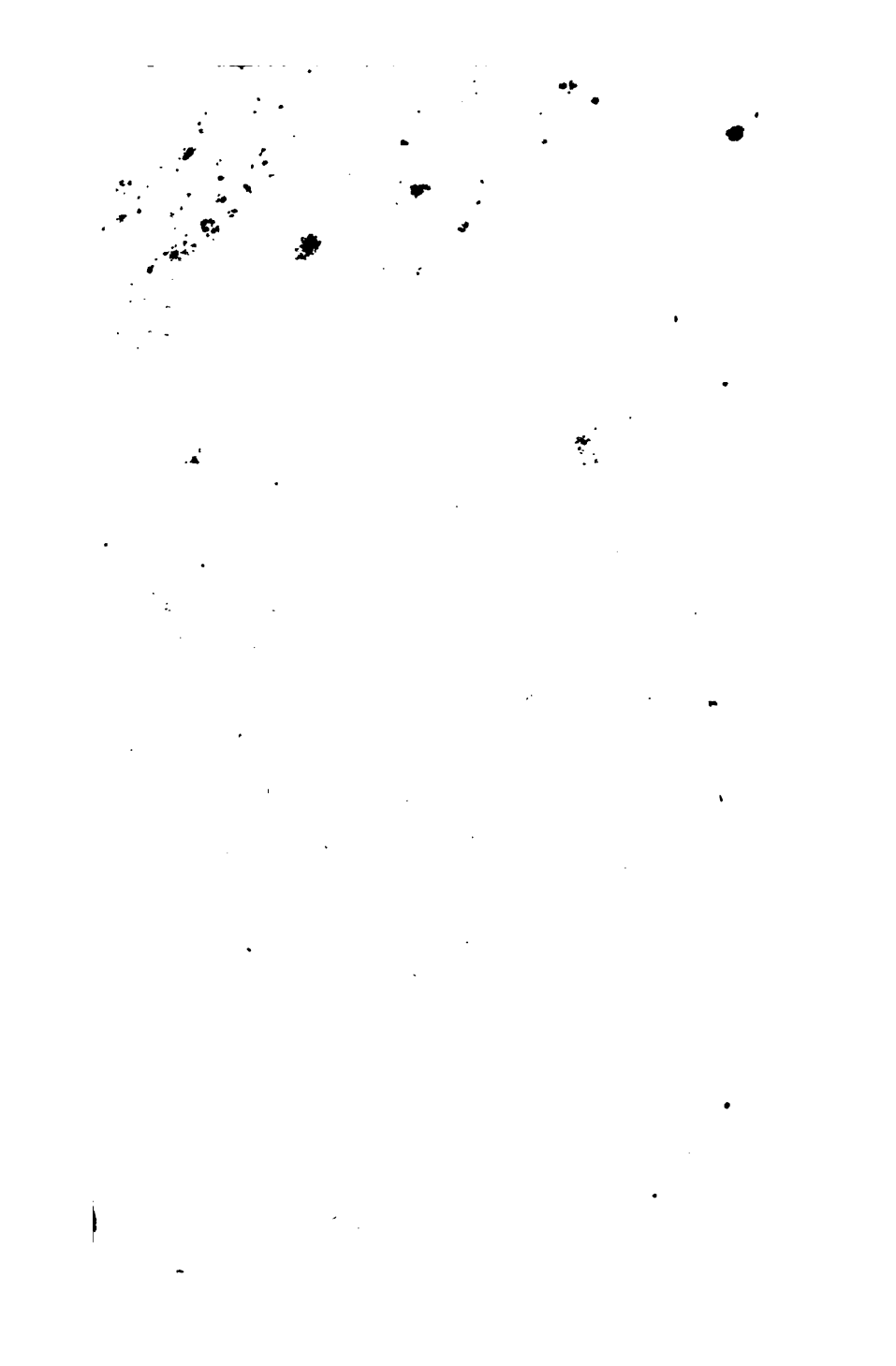
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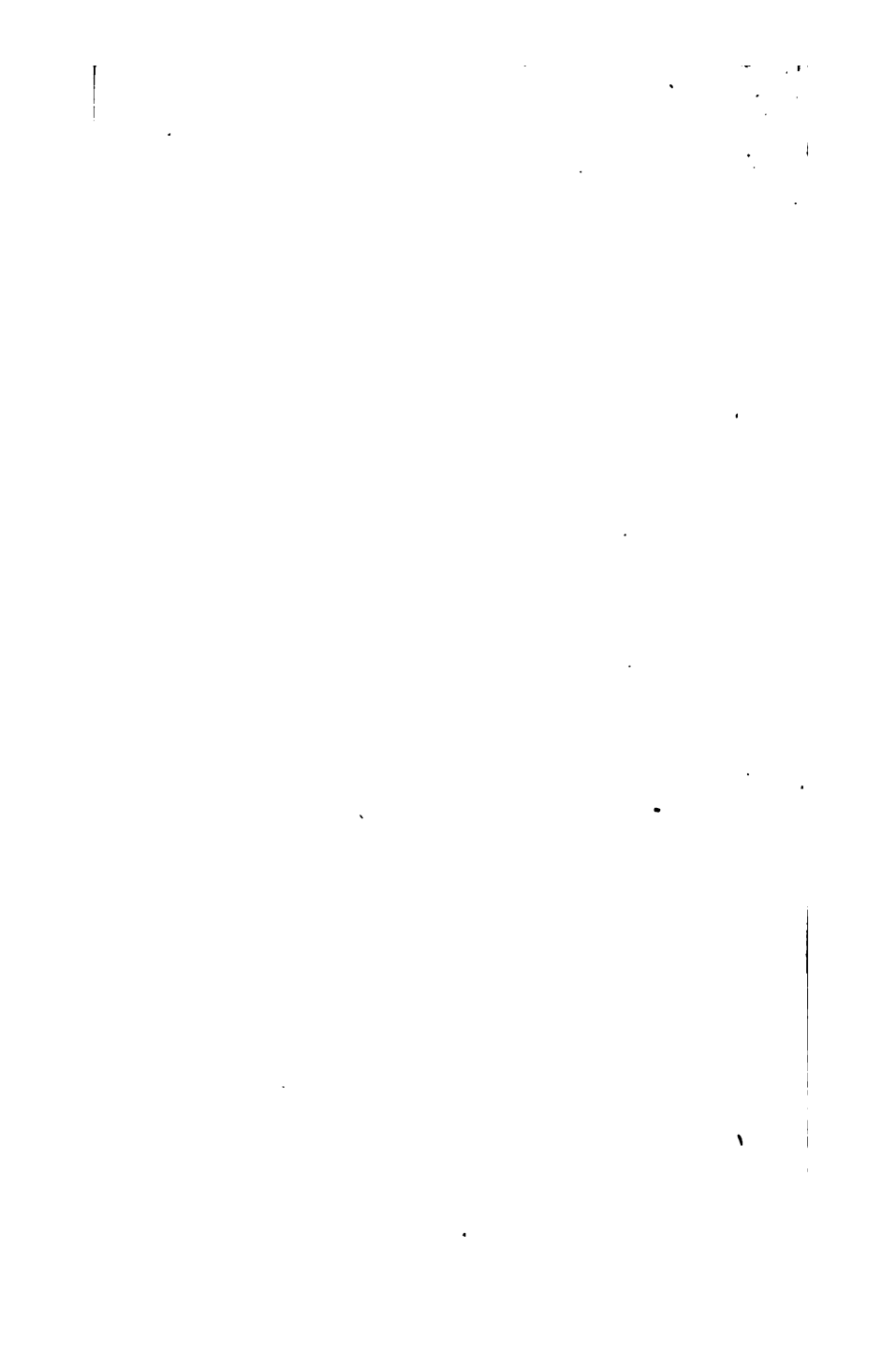
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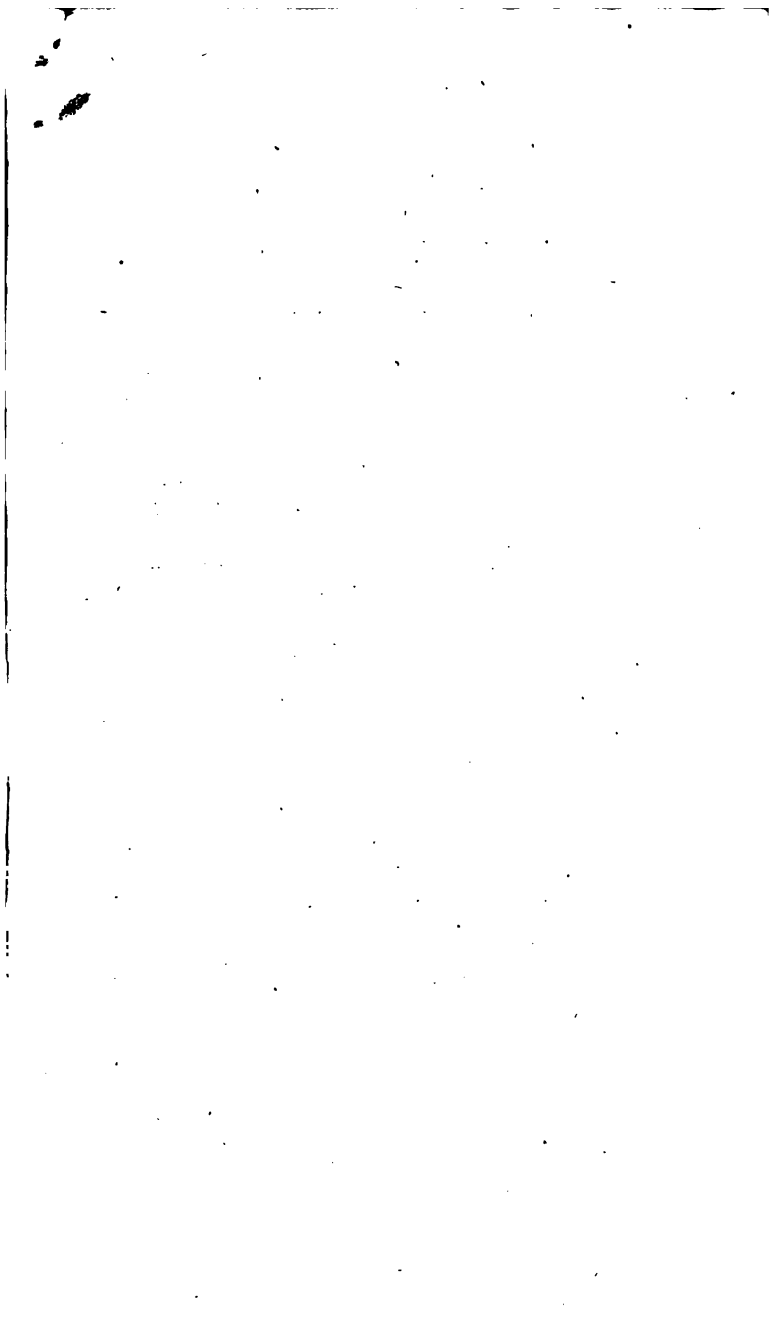
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1817.

REF A C E

TO THE FIRST EDITION.

the advantages of our law,"
delighting and instructing
person lives in the deepest interest
the beginning of a second century, yet
English, and though in the study
as the knowledge of the country
so excellent in its nature and character
Coke has been called the first
The great name of the law, Sir

[illegible]

P R E F A C E

TO THE FIRST EDITION.

THE great *oracle* of the law, Sir Edward Coke, has observed, "that there is no learning so excellent for all sorts and degrees of people, as the knowledge of the common law of England; and though in the study of it, at the beginning it seems difficult, yet when a person dives to the depth thereof, it is greatly delightful; and he which reaches deepest sees the admirable secrets of our law."

The famous Chancellor Fortescue, in his learned treatise *de Laudibus Legum Angliæ*, likewise observes, "that the Latin words *jus* and *lex* intend the law under the consideration of a *science*; wherefore, he says, after you have made some progress in common *grammar*, it will be necessary and sufficient to use the same method and proportion in the study of the law: and as *etymology*, *orthography*, *prosody*, and *syntax*, are the springs and fountains of grammatical learning, so the *principles*, *causes*, and *elements*, are the foundation of learning in the law."

On considering what has been so wisely observed by two such most learned, excellent, and worthy persons, I have very great encouragement; to which I add, that as among the liberal sciences the *art of grammar* has always the precedency, it being *janua omnium artium*, the portal by which we enter into the knowledge of all arts, and whereby we communicate ourselves and studies to others; it is from all these considerations that I have at length, though late, now attempted a *Grammar of the Law*; contained in the several distinct heads or chapters, of *Definitions, Grounds and Principles, Maxims and General Rules, Moot Points or Cases, Words of Art, and Terms, and Fictions, &c.*

Under this division of *Titles*, is here comprised a *general knowledge of our whole law*, in a brief *epitomy*; and the *best method* of instruction: and, I think, there is no room to question that in great *schools*, and particularly at *colleges* in the *universities*, before the diligent scholars leave those academies, some chosen *lessons* or *sentences* got by heart from this *Law Grammar*, and daily repeated with their other learning, would be a singular benefit and advantage to them; not only in their future *conversation* with others, but also in preserving their own *estates and fortunes*, and *lives and liberties*, and by keeping them *out of danger*, especially the greatest, that of offending the law.

To that good end and purpose, I have been fuller in treating of all the *crown laws*, relating to *offences*, than on any other laws or statutes, being very sensible they most concern mankind in general, and preserve and establish the *peace* of the kingdom; without which provisions there are many persons in the world, who, like fierce and savage wolves, would prey upon and devour one another.

But in this extensive law branch, and indeed every where else, my discourse I have generally confined to *short periods*, having divided all long sentences, the more effectually to *impress* things on the *memory*, and there to retain them; and likewise to make the matter of the *greatest importance*, appear the most *conspicuous* and *remarkable*, by separating it from the rest; which new method of handling our laws, I think is in some sort *academical*.

Further, I have here inserted a great number of the choicest Latin *maxims* of the law, beyond what otherwise I should have done, but with a design to *please*, as well as *instruct* all youth at our universities, or inns of court, and young gentlemen in their *private education*; also, sometimes, I have made small *philosophical* and other digressions, for their better improvement and entertainment.

On the whole, the following little tract is

PREFACE.

a quite *new Essay*, there being no treatise any ways like it hitherto published, and therefore it is to be hoped it will be favourably received by every *impartial reader*, since I may truly assure them, it throughout contains very *material and useful* information.

"Multum in parvo."

G. JACOB.

ABBREVIATIONS.

Al.		Aleyne's Reports.
Bac. Abr.	:	Bacon's Abridgment.
Bac. Max.	:	Bacon's Maxims in Law.
Bl. Com.	:	Blackstone's Commentaries on the Laws of England.
Bract.	:	Bracton de Legibus.
Bulst.	:	Bulstrode's Reports.
Burr.	:	Burrow's Reports.
Can.	:	Canons.
Ch. Rep.	:	Chancery Reports.
C. J.	:	Chief Justice.
Co. Lit.	:	Ld. Coke's Commentary on Littleton's Tenures.
Inst.	:	Coke's Institutes of the Laws of England.
Co. Rep.	:	Coke's Reports.
Co. Dig.	:	Comyn's Digest.
Cowp.	:	Cowper's Reports.
Cro. Eliz.	:	Croke's Reports, time of Elizabeth.
Cro. Jac.	:	Croke's Reports, time of James.
Cro. Car.	:	Croke's Reports, time of Charles I.
Dav. Rep.	:	Davies's Reports.

ABBREVIATIONS

Dr. & Student	Doctor and Student
Doug.	Douglas's Reports
Term. Rep. of T. R.	Term Reports, by Durnford and East.
Dyer	Dyer's Reports
East. P. C.	East's Pleas of the Crown.
Esp.	Espinasse's Reports at Nisi Prius.
Fitzherb. or Fitzherb.	Fitzherbert's Natura Brevium.
Fortescue	Fortescue's Reports
Foster, C. L.	Foster's Discourses on the Crown Law.
Freem.	Freeman's Reports.
Gilb.	Gilbert.
Gilb. Evid.	Gilbert's Evidence.
Godb.	Godholt's Reports.
Hale's P. C.	Hale's Pleas of the Crown.
Hale's Sum.	Hale's Summary of the Pleas of the Crown.
Hawk. P. C.	Hawkin's Pleas of the Crown.
Hardr.	Hardres' Reports
Hob.	Hobart's Reports.
T. Jones.	Sir Thomas Jones's Reports.
Keb.	Keble's Reports.
Kel. Rep.	Kelynge's Reports.
Leach C. L.	Leach's Cases in Crown Law.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lut.	Lutwyche's Reports.
Mod.	Modern Reports.

ABBREVIATIONS.

Noy's Max.	Noy's Maxims.
Perk. or Perkin.	Perkin's Conveyancer.
Plowd. or Pl. Com.	Plowden's Commentaries or Reports.
Poph.	Popham's Reports.
L. Raym.	Lord Raymond's Reports.
T. Raymond.	Sir Thomas Raymond's Reports.
Roll. Ab.	Rolle's Abridgment of the Law.
Roll. Rep.	Rolle's Reports.
Saund.	Saunders's Reports.
Stark. N. P. R.	Starkie's Reports at Nisi Prius.
Stat. Tri.	State Trials.
Stat.	Statute.
Staund.	Staundforde's Pleas.
Str.	Strange's Reports.
Styl.	Style's Reports.
Vaugh.	Vaughan's Reports.
Ventr.	Ventris's Reports.
Vin. Abr.	Viner's Abridgment.
Wood's Inst.	Wood's Institutes of the Laws of England.

LAW GRAMMAR.

LAW in general, is defined to be a certain rule for the well-ordering of civil society; or it is an art directing to the knowledge of justice.

Lex est sanctio justa jubens honesta & prohibens contraria. Bracton, c. 3. s. 1. f. 2.

The subjects of it I divide into Six Parts.

- I. Definitions.
- II. Grounds and Principles.
- III. Maxims and General Rules.
- IV. Moot Points or Cases.
- V. Words of Art and Terms.
- VI. Fictions, Intendments, &c.

I. *Of particular Definitions.*

AND Laws are held to be either *Natural* or *Arbitrary*.

1. The *Natural Laws* are such as in them-

selves are just and good, and binding in all places, for they are every where the same, being from God himself.

2. The Arbitrary Laws are institutions made by men, founded on convenience, and which depend on the authority of the legislative power that made them: they are designed for maintaining public order.

But all laws, according to Fortescue, derive their force *à lege naturæ*, from the law of nature; and Limited law of nature is the law now used in every state. *Fortescue de Laud. Leg. Angl.* c. 16.

The Laws of England are divided into three sorts.

1. The *Common Law*, which is taken for the law of England simply, without any other law whatsoever, before any statute was enacted to alter the same: it is grounded on the general customs of the realm.

This law (says Lord Hale) is singularly adapted to the frame of our constitution.

'Tis that which maintains and provides for the safety of the king's person, his crown and dignity, and all his just rights and prerogatives.

And this law is also that which declares and asserts the rights and liberties and property of the subject. *Hale's Hist. Com. Law.* c. 3.

2. The *Statute Law*, or statutes made by the king and both houses of parliament, which are usually for providing against new

mischiefs and evils that arise by the corruption of the times.

3. *Particular Customs* in divers parts of the kingdom, used by the people, and found to be beneficial, and which being continued time out of mind, without interruption, have obtained the force of a law, to bind the places, persons, and things, concerned therein. *Co. Lit.* 110.

Consuetudo pro lege servatur.

But our Laws have a larger particular division, into these following, viz.

1. The *Crown Law*, concerning the king and his prerogative.

2. The *Law and Custom of Parliament*, to determine matters there done.

And by Holt, C. J., this law ought to be determined in the King's Bench, where any question arises thereon. *R. Raymond.* 18.

3. The *Common Law*, that is common to the whole kingdom.

4. The *Statute Law*, enacted in parliament.

5. *Reasonable Customs*, established by long usage.

6. The *Law of Arms*, relating to war and martial affairs.

But what is called the *Martial Law* may not be exercised on persons in time of peace, when the king's courts are open for justice; except it be by authority of parliament, as is of late

Of Definitions.

times done by annual acts for punishing of mutiny and desertion in the army.

7. *Ecclesiastical or Canon Laws.*

8. *The Civil Law* used in certain cases.

For the use of these two last laws here in England, see post.

9. *The Forest Law*, for preserving the king's game.

10. *The Law of Marque and Reprisal*, to redress people injured at sea.

11. *The Law-Merchant*, proper to merchants, and differing from the Common Law, but become a part of the laws of the realm.

As to the Civil and Canon Law.

1. *The Civil Law* is that law which every particular nation or commonwealth has peculiarly established for itself.

Jus Civile est quod quisque Populus sibi constituit.

In a stricter sense, it denotes that law which the old Romans made use of, and was compiled from the laws of nature and nations; also the twelve tables were the foundation of it, which are highly esteemed for their great equity.

This law is allowed here in the two universities of *Oxford* and *Cambridge*, for training up students, &c. In matters of foreign treaties, marine affairs, ordering martial causes,

Of Grounds and Principles.

5

judgments of ensigns and arms, rights of honour, &c.

2. The *Canon Law* signifies the law of the church, and consists of certain rules taken out of the Scripture, the writings of the fathers, the ordinances of general councils and decrees of popes in former ages.

The *general Canon Law* is no farther in force in this kingdom, than it has been received here, and is consistent with either our common or statute law.

Though we have particular canons made in the convocation, and having the king's royal assent, for the government of the church, religion and clergy, &c.

Which are warranted by act of parliament, and deemed the laws of this land. *Can. Jac. 1.*

II. Of Grounds and Principles.

By grounds are meant the foundations, and by principles the efficient causes of things; and elements are the matter and form thereof.

The several grounds of the law of England, in ancient authors, are said to be these:

1st, The *Law of Reason*, which is observed in this realm, as in all others; and reason is the gift of God to man, or power of the soul that discerns between good and evil, comparing the one with the other, and which shews virtues, loves good, and flies vice; from

whence it is termed the first rule, that all things must be ruled by.

2dly, The *Law of God*; and therefore it has been formerly inquired in divers courts, if any persons held opinions secretly or otherwise against the true catholic faith; or if any general custom were contrary to the law of God, or any statute was made directly against it.

3dly, The *general Customs*, from time immemorial, used throughout all the land, which have been ever approved by the king and all his subjects, as being neither against the law of God nor the law of reason; and which are properly called the Common Law.

4thly, The *Law Maxims*, consisting of divers principles that have always been taken for law in this realm; and what is a maxim or general custom, and what is not, shall be determined by the judges.

5thly, The *particular Customs* used in several counties, towns, cities and lordships of the realm; and these, because they are not contrary to the law of reason nor the law of God, though against the general customs or maxims of our law, yet they stand in effect for law.

6thly, The *Statutes* enacted by our lord the king, and by the lords spiritual and temporal, and the commons in divers parliaments, in such cases where the law of reason, the law of God, customs, maxims, and other rules of law, have not been sufficient to punish evil men, and reward the good.

There are no other grounds of the laws of England; though according to Lord Coke, the Common Law is the common birth-right that the subject hath for safeguard and defence of his liberties and properties, viz. not only of his goods, lands, and revenues, but also of his wife and children, body, fame, and life. *Co Lit.* 142.

On the foundation of our laws, and from natural principles of justice, every person is entitled to his Life, Liberty, and Property, who has done no act to forfeit either.

A person's life may be unlawfully taken away divers ways; as in cases of murder, manslaughter, poisoning, &c.

A man's liberty may be affected in several manners, as by false arrest and wrong imprisonment, &c.

And a person's property may be trespassed upon and lost, by taking away his goods, committing felony, robbery, or burglary.

The life of the King, as he is head of the commonwealth, is most precious in the eye of our law, wherefore attempts against him are deemed treason (a); and the crimes touching life are the following.

(a) Crimes of this class may be distinguished into four kinds. 1. Treason. 2. Felonies injurious to the king's prerogative. 3. Præmunire. 4. Other misprisons and contempts. 4 *Bl. Com.* 74.

1. *Treason*, which in general signifies a betraying, (*proditio*;) is divided into *High Treason* and *Petty Treason*: the first of which is defined to be an offence committed against the security of the king or kingdom:

As to compass or (a) imagine the death of the king (b), queen, or prince, their eldest son and heir; and declaring the same by some open deed;

Or to levy war against the king in his realm:

(a) There have been many comments upon these words, *compass* and *imagine*; and I should with great deference think, that notwithstanding the general excellence of this most wise and important statute, the word *imagine* is not sufficiently explicit, and is likewise too figurative to be made use of in describing this most capital of all criminal offences. Is it not extraordinary, that the life of an Englishman, prosecuted by the crown, should continue to depend upon the critical construction of two obsolete French words? *Observ. on Stat. 175.* does not the legislature *imagine* the death of the king, when it provides for the case of the crown's descending to a minor?

(b) A king *de facto* is here intended by the statute.

Or to adhere to the king's enemies, or give them aid within the realm or without ;

Or to violate the king's wife (a), or his eldest daughter unmarried, or the wife of the prince ;

Or to counterfeit the king's great seal, privy seal, or his money ;

Or to kill the chancellor, treasurer, or any of the king's justices of either bench, justices of assise, &c. in their place doing their offices.

These are all declared treason by the statute 25 E. 3. c. 2. And to what is an open act, a design to depose or imprison the king, is an overt act to manifest a compassing of his death. *Fost. Cr. Law*, 195. s. 3 (b).

Conspiring the *Death of the King*, providing weapons to effect it, or sending letters to second it ; assembling people to take the king into their power, and writing to a foreign prince inciting to invasion, are overt acts. *Hale's P. C.* 13.

(a) This does not extend to a queen or princess dowager. By an enemy is to be intended one who owes no allegiance to this crown, but is the subject of a foreign prince.

(b) The compassing, an act of the mind, is considered as the treason, the overt acts as the means made use of to effectuate the intention of the heart ; and as the overt act is the charge which must be alleged and proved, it is that to which the prisoner must apply his defence.

A compassing by bare words, was formerly held to be no overt act of treason; but since it has been adjudged otherwise, where the words shew a direct purpose against the king's life; then they amount to an overt act of compassing or imagining his death. *Kel. Rep.* 13. See *Hale's P. C.* 111. *Hawk. P. C.* 395. *Read. Stat. Law*, 146. *Hensey's Case* in *Fost.* 198, 202. s. 8. *Bur.* 642 (a).

Words, though set down in writing, if kept privately in a man's closet, are no overt act, except they are published. *Hawk. P. C.* 38. s. 32. but see *Fost. Cr. Law*, c. 1. p. 198.

The law judges every rebellion to be a plot against the king's life, and a deposing him.

And under compassing and imagining the king's death, intention of treason proved by circumstances, is punished as high treason; for men's actions are governed by their intentions. *5 Mod.* 207, 208.

A conspiring or compassing to levy war is not an overt act, without a war levied *de facto*; but if a war be actually levied, the conspirators are traitors, although not in arms.

And a conspiracy to levy war, 'tis said, will be evidence of an overt act for compassing

(a) But the words must be attended or followed by some consultation, meeting, or act, and then they are evidence of the treasonable intentions of the party.

the king's death. 3 *Inst.* 14. *Fost. Cr. Law* 211.

Not only such persons as take up arms against the king; but all who in a violent manner withstand his lawful authority, or attempt a reformation of his government, do levy war against him.

Those that make an insurrection to redress any public grievance, whether a real or pretended one, are said to levy war against the king, and to be guilty of treason; though they have no design against his person. *Hawk. P. C.* 37. s. 25.

And Lord Mansfield declared it to be the opinion of the court that an attempt by intimidation and violence to force the repeal of a law, was a levying war against the king, and high treason. *Doug.* 570.

So where great numbers by force endeavour to remove certain persons from the king, or to lay violent hands on a privy counsellor or magistrate for executing his office; or to change religion or the law, to cast down all inclosures, &c.

But raising a force to burn, or throw down a particular inclosure, being a grievance to men's private interest, is only a riot.

Holding a castle against the king's forces, is a levying of war; and keeping together a great number of armed men, against the king's express commands, has been held treason. *Fost.* 219.

Persons who have joined with rebels *pro*

14 *Of Grounds and Principles.*

certainty of the king's issue, and raised contentions about the succession of the crown.

If the queen consents, it is treason in her; but this extends not to a queen dowager. The same law of the prince's wife; to violate whom is only treason during the marriage; the eldest daughter of the king is she that is then living and not married at the time of the violation.

And though there was an elder than her, who died without issue; because now she has a right to the inheritance of the crown, on failure of the issue male. 3 *Inst.* 9.

Treason against the life of the queen must be also during coverture, and does not extend to a dowager.

The *Counterfeiting the Great Seal* or Privy Seal must be an actual counterfeiting; therefore an intent or going about to counterfeit it, is no treason.

And affixing the great seal without warrant, or taking off the wax impressed from one patent, and fixing it to another, or erasing any thing out of a patent and adding new matter, are not a counterfeiting and treason within this act, but a great misprision. *Hale's Sum.* 18. 3 *Inst.* 16.

Persons that aid and consent to the counterfeiting the great seal, are equally guilty with the actors.

Counterfeiting the privy signet, or sign manual, is not treason within this act, but made so by 1 and 2 *P. and M.* c. 10.

Forging or Counterfeiting the King's Coin, is treason by the common law and by statute: the counterfeiting, clipping, and filing money, either of this kingdom, or foreign coin, made current by proclamation, is high treason by 5 *Eliz.* c. 11.

There arises no corruption of blood, or loss of dower, on committing this treason, as there does in other cases.

If any person bring into the realm counterfeit money, it is treason within the statute of *Edw.* 3. But then it must be according to the similitude and likeness of English money, and brought from some foreign realm, knowing it to be false, and be uttered in payment.

The bare forging of the king's coin, without uttering, is treason.

Also if persons who have authority from the king to coin money make it of greater alloy, or less weight than they ought, it is said to be treason. 3 *Inst.* 16, 17.

The making of any stamp or die, for coining, except by persons employed in the mint, or conveying them from thence, is high treason; and colouring metal resembling coin like gold or silver, or marking on the edges, is likewise treason by 8 and 9 *W. 3.* c. 26.

Persons washing, gilding, or colouring any shilling or sixpence, or altering the impression, so as to make them resemble a guinea or half guinea, are guilty of high treason by the late act 15 *Geo.* 2. c. 28.

And those who tender in payment any

counterfeit coin knowingly, shall be imprisoned for a first offence six months, two years for a second, and a third offence is felony.

Counterfeiting copper halfpence or farthings is not treason, but the offenders are to be imprisoned two years, and give security for their behaviour. *Ibid.*

A reward of 40*l.* is given for apprehending money-coiners of gold and silver, by 6 and 7 *W. 3. c. 17*, and 10*l.* reward for coiners of copper money, &c. 15 *Geo. 2. c. 28*.

Any persons may cut or break pieces of silver money suspected to be counterfeit, or unlawfully diminished; but if they prove good coin, shall stand to the loss, 9 and 10 *W. 3. c. 21*.

The treason in killing the Chancellor, Treasurer, or Justice of the Bench, &c. extends to these only when in the actual execution of their office (*a*), representing the king's person; and only to a killing, not a wounding or attempting to kill, without death. *Hale's Sum. 17.*

(*a*) It extends only to the officers specified in the act; and therefore the barons of the exchequer, as such, are not within it, but the lord keeper or commissioners of the great seal seem to be within it by virtue of the statutes 5 *E. c. 18. 1 W. and M. c. 21*; and extended to the lords of session or judiciary in Scotland by 7 *Anne, c. 21*.

But by the statute 3 *H. 7. c. 14.* compassing to kill the king, or any of his council, was made felony.

And assaulting a privy counsellor executing his office, and making any attempt to kill him, is felony by the 9 *Ann. c. 16.*

Of other particular Treasons by Statute.

Persons refusing the oath of supremacy on the second tender, were adjudged guilty of treason, without corruption of blood, by 5 *Eliz. c. 1.*

And absolving subjects from obedience to the king, or reconciling them to the see of Rome, is treason in the reconciler and persons reconciled. 23 *Eliz. c. 1.*

Saying the king is a papist, or he intends to introduce popery, intending death or bodily harm, or a restraint of the king's person, &c. is high treason, in case the offenders express or declare their intention, by printing, writing, preaching, or malicious speaking. 13 *Car. 2. st. 1. c. 1.*

Persons maliciously, by writing or printing, declaring that the king is not lawful king, or that the pretender hath any title to the crown, are guilty of treason.

And preaching any such doctrine, teaching or advisedly speaking, &c. incurs the penalty of a præmunire.

And for the suppression of seditious prac-

tices and attempts, by 36 Geo. 3. c. 7, if any one shall compass, imagine, or intend death or any bodily harm to the king's person, or to depose him, or to levy war in order by force to compel him to change his measures or counsels, or to overawe either house of parliament, or to excite an invasion in any of his majesty's dominions, and shall express and declare such intentions by printing, writing, or any overt act; he shall suffer death as a traitor: and if any one, by writing, printing, preaching, or other speaking, shall use any words to excite the people to hatred and contempt of the king or of the government and constitution, he shall incur the punishment of a high misdemeanor, i. e. fine, imprisonment, and pillory; and for a second offence be subject to a similar punishment, or transportation for seven years, at the discretion of the court.

Also hindering any person, who shall be next in succession, from coming to the crown, is made high treason. 1 Anne, st. 2. c. 17.

But in every case of treason that relates to the king's person there must be overt acts of it; which are to be made appear by plain and sufficient proof, and not by conjectures.

The offender must be lawfully attainted thereof, either by confession, or by his peers in his life-time;

And, therefore, if a person be slain in open war, he shall forfeit nothing, nor can he be attaint in such a case, but by parliament. *Hale's P. C.* 10.

Infants within the age of discretion, and persons *non compos mentis*, cannot be guilty of treason; so that if a traitor becomes *non compos* before conviction, he may not be arraigned, and if after, shall not be executed. *Ibid.*

A person indicted for high treason, is to have a copy of his indictment five days before trial, and shall be admitted to make a full defence, by counsel learned in the law, and by lawful witnesses, &c.

And there must be two witnesses to the same overt act, or two acts of the same treason, produced face to face, to make out the treason against him. 7 *W. 3. c. 3.*

All are principals in high treason; and on an attainder of treason, the judgment in all cases, except for counterfeiting the coin, is, that

The offender shall be drawn on a hurdle or sledge to the place of execution,

And there be hanged by the neck, but cut down alive, his bowels ript up, taken out, and burnt before his face;

His head severed from his body, his body divided into four quarters, and those be disposed of as the king thinks fit. Though where a peer commits treason, the king usually remits all but beheading. 3 *Inst. c. 101.*

For counterfeiting the king's coin, the offender is to be adjudged guilty of high treason, and to be drawn and hanged: 5 *E. c. 11*; 18 *E. c. 1*; 8 and 9 *W. 3. c. 26*; 7 *Ann. c. 25*; 15 and 16 *G. 2. c. 28.* And the judgment in

petty treason, is for a man to be drawn and hanged; and for a woman, to be drawn and burnt.

But judgment for murder and felony, is for a man or woman to be hanged by the neck till dead; and in extraordinary cases of a barbarous murder, the offender's body is hanged in chains.

And though the highest pain is, that such a criminal shall be hanged until he be dead; yet implicitly he is also punished in his wife, that she shall lose her dower;

In his children that they shall become base and ignoble; and he shall lose his posterity, for his blood is corrupted that they cannot inherit to him, or any other ancestor:

And he shall forfeit all his lands, tenements, and hereditaments, and likewise all his goods and chattels.

2. The crime of *Petit Treason*, by the statute 25 *Ed. 3.* is where a person out of malice takes away the life of a subject to whom he owes special obedience; and may be in three particulars.

As where a servant out of malice kills his master; or a wife killeth her husband;

Or an ecclesiastical person, secular or regular, kills his superior.

And this is called petty treason, in respect to high treason, which is committed against the king.

In our law this crime implies the highest degree of murder; and it is said, that two

witnesses are required to find the indictment for petty treason; but not to the trial of it, for it is not within the act 7 *W. 3.* 2 *Hawk. Pl. Cr.* 258.

But though a person on the evidence of one witness only, will be acquitted of the petty treason, he may be convicted of murder. *Leach. C. L.* 363.

The aiders and abettors, as well as the procurors, are comprised within the statute of *Edw. 3.* And whatever will make one guilty or principal in murder, shall make him so in petty treason.

But if the servant does kill the master upon a sudden falling out, or on *se defendendo*, it is not petty treason, but manslaughter. *Hale P. C.* 24.

If a son kills his father or mother, though the offence is most heinous, he shall not be tried for petty treason, unless he served his father for wages, &c. and then he shall be indicted by the name of a servant.

This is because the son is not within the meaning of the words of this act; yet where a servant kills his mistress, or his master's wife, she is master within the letter of the statute, 3 *Inst.* 90.

In case the servant or wife are of confederacy to kill the husband or master, and be in the same house, though not in the same room, they are principals and guilty of petty treasons; for by law they will be adjudged present.

A married woman and another person kills the husband, here the wife is deemed guilty of petty treason, and the other of murder.

Though if a wife and her servant conspire to kill the husband, for which they appoint time and place, but the servant alone in the wife's absence killeth him, this shall be petty treason in both.

The Lord Dyer in his Reports, says thus of petty treason :

If a servant slay his master, by the procurement of the wife, though the wife be absent, it is petty treason in her as well as the servant, because it was petty treason in the principal ; but if the murder by her procurement were done by a stranger in her absence, it is but murder in her, it not being petty treason in the stranger. If the master be murdered by a stranger, by the procurement and in the presence of the wife or servant, it is petty treason in them, and murder in the stranger, because all principals. *Dy.* 332. *pl.* 25.

Persons guilty of petit treason, as well as aiders, abettors, and counsellors, are deprived of the benefit of clergy. Statutes 12 *H.* 7. c. 7 : 23 *H.* 8. c. 1 : 4 and 5 *Ph.* and *M.* c. 4.

3. The next crime is *Murder* ; which is a wilful and felonious killing of another, upon malice forethought.

This offence may be committed in divers ways ;

As by weapon, crushing, or bruising ; ..

By shooting, smothering, or poisoning ;
And by strangling, starving, &c (a).

But the person wounded or hurt must die within a year and a day after the fact committed, or the law will presume he died a natural death.

If in that time the party dies, although it be by disorderly living, the wound, or other injury, will be judged the principal cause of his death, to make it murder. *Kek* 26.

In the case of stabbing another, if any one stab a person who hath not at that time any weapon drawn, or hath not first stricken, the party which stabs is guilty of murder, if the person die within six months after; by stat. 1-Jac. c. 8. *Fost. C. L.* 297.

Though where a man that is *non compos* kills another person, that is not murder. 'Tis the same of a lunatic during his lunacy. But he that incites a madman to kill a person, is a principal murderer.

And if one that is drunk killeth another,

(a) To constitute the crime of murder these things must concur: that it be committed by a person of sound memory and discretion at the time; it must be an unlawfully killing; the person killed must be a reasonable creature, in being, and under the king's peace; and lastly, it must be done with malice aforethought, which may be implied as well as expressed. *4 Bl. Com.* 195.

it is felony and murder by our law. - *Hale's Sum.* 43.

A person under the age of discretion kills a man, it is not felony; though if by circumstances it appears an infant under twelve years old, could distinguish good and evil, and knew what he did; if he kill another, it may be murder: as if he hide the dead body, make excuses, &c.

It is not the bare killing, but malice, that makes the crime of murder; and the malice must be of corporal damage to the party; and if it be not continuing till the death, it is no murder. *Hale's P. C.* 49.

This malice is either expressed, or it is implied.

The express malice, is when it is evidently proved there was some ill will or old grudge before the killing, and the fact was committed with a sedate mind, and a former design of doing it.

And implied is, where a person kills another having nothing to defend himself; as in going along a street, over a stile, or the like.

If a killing or murder be perpetrated through a direct purpose to act some personal injury to the person slain, it is said to be properly of express malice. *Kel.* 126.

As where a man in cool blood, maliciously and deliberately beats another in such a manner, beyond any appearing design of chastisement, that he dies:

In that case it is murder, by express malice, though he did not intend to kill him ;

For if a person voluntarily commits any violent or cruel act, which is attended by death, in judgment of law he is looked upon to do it of malice aforethought.

And where one executes his revenge in a cruel manner, with a dangerous weapon, as shews a malicious design of doing mischief, and death ensues thereon, it is express malice and murder from the very nature of the fact. *Kel. 127.*

By poisoning a person ; and where a man killeth another without provocation, malice is plainly implied. If one resolves to kill the first person he meets, and kills him accordingly, it is murder, though he knew him not, for here malice is implied against all mankind.

One lays poison to kill a certain person, and another takes it and dies, it is murder : it would be otherwise if laid to kill rats.

And if A bearing malice to B, strikes or shoots at him, but misseth him, and kills C, this will be murder in A, and if it were without *malice prepense*, then manslaughter.

In such case the malice intended to one, makes the death of another upon that malice, murder, and qualifies the act as if it had its due effect.

If a man does a thing that apparently must introduce harm ; as where he runs among a

multitude of people with a horse used to strike, &c. and one is killed, it is murder, if done with an intent to do harm.

For an intention of evil, though not against a particular person, makes a malice, and the fact thereon is murder. *Hale's P. C.*

A person finds a boy stealing wood; he bound him to his horse-tail, the horse ran away with him, and killed the child, it was adjudged murder.

The causing an abortion, by giving a potion to, or striking a woman big with child, was formerly murder; but now a great misprision only, unless such child be born alive, and die of the bruise.

But now it is made felony without benefit of clergy, by 43 *Geo. 3. c. 58.*

Where the death of a bastard newly born, is concealed, it shall be supposed to have been murdered; except the mother proved it born dead. 21 *Jam. c. 27.*

This statute is repealed by stat. 43 *G. 3. c. 58.* and women charged with murder, implied by the concealment of the birth, are to be conducted by the same rules of evidence as other trials for murder: and if acquitted of the murder, she may be sentenced to two years' imprisonment.

If an infant be laid under leaves or trees, and suffered to be destroyed by vermin; or a sick man in the cold, whereof he dies, either are a killing. 3 *Inst. 48.*

Of Murder, by Combat and Duelling, &c.

In case two persons fight in cool blood, on a former quarrel, and one of them is killed; and where, upon a sudden falling out, one appears to be master of his temper, and kills another, it will be a murder.

For where there is a fighting between two, on such precedent quarrel, it may be presumed to be on malice prepensed.

And though two persons fall out early in the morning, and meet in the afternoon of the same day, if one be killed, it is murder; for their after meeting is of malice.

But if A and B are at malice, and reconciled, and after upon a new occasion they fall out, and B is killed, it is held to be no murder.

So it is, where they combat on malice, and being parted, afterwards they meet and fight upon a sudden, and one kills the other; by some it is not murder, because the first malice is satisfied. *Hale's Sum.* 49.

Yet if the party killed, in the first combat had wounded the party slaying, it might be otherwise.

If there be a quarrel between two persons, and one challenges the other, who declines meeting him, but at length upon importunity, and to vindicate his reputation, meets and fights, and kills the challenger, it is murder. *Kel.* 27.

Though here if the person challenged refuse to meet, and saith he shall go to-morrow to such a town, and being assaulted by the way, he kills the challenger, it is manslaughter only.

Where two persons A and B fall out, and on a challenge they appoint the field, and each takes his second with him; if A kills B, this is certainly murder in A's second; and it hath been also adjudged murder in the other second; but this last seems otherwise according to *Hale's Sum.* 51.

'Tis said by some, that the seconds of the person killed, are equally guilty of murder, by reason of the encouragement which they gave by joining with him.

A and B falling out on a sudden; they presently agree to fight, and each fetches a weapon, then they go into the field, and one kills the other, this is only manslaughter, because the blood never cooled.

'Tis otherwise, if they appoint to fight the next day, or at any other time.

If there be malice between A and B, and upon that malice they meet and fight; here though A gives the first blow, yet if B kill him, it will be murder. *Hale's Sum.* 47.

In the common law it is of no signification who begins the quarrel, or gives the first stroke: and no words, though ever so reproachful, are a sufficient provocation to extenuate the crime of murder;

But if angry words pass between two per-

sons, and one pulls the other by the nose, whereupon the person assaulted kills him immediately, it is but manslaughter, from such a sudden quarrel.

If a man provoked by words or gestures, makes a push at a person before his sword is drawn, and a fight ensues, wherein he who made the assault kills the other, it is murder:

Here, in case he had made no push till the other's sword was drawn, it would have been only manslaughter in the person killing.

A person assaults another with malice, though he be afterwards driven by the other to the wall, and there he kills him in his own defence, it is murder by reason of his first intent.

In this case if the party assaulted fly to the wall, and being still pursued, he kill the other, it is only manslaughter.

Two having malice prepense fight, and the servant of one of them not acquainted with the malice, takes part with his master, and kills the other; this is murder in the master, and but manslaughter in the servant:

But when there is a conspiracy to kill a man, but no malice against his servant, if the servant be slain, the malice against the master shall be adjudged to extend to his servant, the killing of whom is murder.

If two or more come together to kill, rob, or beat a man, or to commit a riot, and one of them kills a person, it is murder in all those of that party that are present, aiding or

abetting thereto, or that were ready to aid him, though but lookers on;

All will be said to intend the murder; but it is otherwise if the lookers on came there by chance.

If offenders come into a park, and the park-keeper shoots at them, whereupon they fly, but he pursues, and they kill him, it is murder in all; for the first entry was with a malicious intent.

In robbing a park and committing murder, all are held to be present that are in the same park, though half a mile distant and out of view.

If any person stand by and encourage another to slay a man; or where one comes with others on purpose to kill him, and stands by till the fact is done, it is murder in all present.

Killing a person endeavouring to part others fighting, though without any evil intention against him, is murder.

And where two men are fighting, if other persons looking on do not endeavour to part them; or to apprehend the murderer, if one be killed, they may be indicted and fined. *Nov.*

Where any magistrate or minister of justice in the execution of his office, sheriff, constable, or watchman in doing his duty, or any one that comes in assistance of the king's officers is killed, it is murder.

And here a person shall not be excused,

by alleging that what he did was in a sudden affray, &c.

If a bailiff is killed, in executing a writ, or process, or a lawful warrant, though the process be erroneous, or he do not produce his warrant if he be a bailiff commonly known, it will be murder;

But here if the officer doth that which is unwarrantable, as if he break open the door of a house or window, to arrest a person in a civil case; or if he arrests a wrong person, or one upon a Sunday, &c., these acts are unlawful, and it is no murder, but only manslaughter to kill him.

Of Killing not Murder, but Justifiable Homicide.

If a man, without any provocation, is assaulted any where by another, in such a manner that it plainly shews an intent to murder him, as by passing at him with a drawn sword, &c., he may justify killing such assailant.

Where one attempts to commit murder, robbery, or other felony, a man or any of his servants may lawfully kill him. So officers endeavouring to disperse a mob, by stat. 1 Geo. 1. c. 5.

Likewise if a woman kills a man, who attempts to commit a rape upon her, she may justify the doing it. *Post.* 274.

Trespassers in forests, &c., not surrendering, but defending themselves, and rioters standing in opposition to a justice's command, the killing them is justifiable. 21 *Ed.* 1. 2, 3, and 4 *W. and M. c.* 10.

So if a felon will not suffer himself to be arrested, or if he flies for it, being pursued upon a hue and cry; or where a prisoner assaults those as conduct him to gaol, or his gaoler in endeavouring to escape, &c., killing such may be justified. 1 *Hale's P. C.* 494.

But this is only when an offender cannot be taken or secured without killing, and there must be in all such cases an apparent necessity.

And if a prisoner by duress of the gaoler comes to an untimely end, it will be murder. *Hale's Sum.* 47. *Hale's P. C.* 466. 2 *L. Raym.* 1578.

There is one kind of killing excusable, where a man kills another *ex necessitate*, merely in his own defence: and another, when it happens by misadventure.

4. The crime of *Manslaughter*; which is where a person is killed upon a sudden falling out, without malice:

Or when one commits a voluntary and unlawful act, but without any deliberate intention to do it: and for this crime the offender shall have the benefit of clergy for the first offence.

Where two suddenly fall out and fight, and one breaks his sword, on which a stander-by

lends him another, wherewith the adversary is killed, it is manslaughter in both the killer and the stranger.

And if a man in vindication of his friend, who is assaulted by another, presently takes up an instrument and kills the other, such act is manslaughter. 1 *Hawk. P. C.*

If a man is taken in adultery with another person's wife, and the husband presently kills the adulterer; this is a great provocation, and makes it but manslaughter. *Kel.* 137. pl. 4. *Ventr.* 158, 159. *T. Raym.* 212. 2 *Keb. Rep.* 829. pl. 49. *Hawk. P. C.* 82. pl. 26. *Fost.* 296.

Two persons strive for the wall in a street, and one kills the other, it is manslaughter, and so it is if two play at foils, and one kill the other. *Hale's Sum.* 57.

A man shoots off a gun in a city, or highway, which endangers the life of some person, and one is killed, it is manslaughter by the common law.

And if one throw stones over a wall, in a place where persons often resort, or at another in play, and kill any person; if it be done without any evil intention, it is manslaughter.

It is not murder, because there is no malicious intention to hurt; nor *per infortunium*, as he was doing an unlawful act.

Where a person shooting at the tame fowl of another, which is an unlawful act, kills a stander-by, it is said to be murder in such person. *Fost.* 258.

If he shoot at a wild fowl, hare, &c., and be not qualified to keep a gun, or kill game, and kills any person, it is manslaughter. But see *Fost.* 259.

And if he is qualified to keep a gun, which makes the intended act lawful, it is only *chancemedley*. 3 *Inst.*

Of killing Persons, Chancemedley and Se Defendendo, &c.

As to *Chancemedley*, it is where a man is doing a lawful act, without any intent of hurt to another, and one is casually killed thereby.

This may be in divers instances; as where a person casts a stone, or shoots an arrow in the fields, or other open place, and they happen to strike and wound a man of which he dies.

If one be cutting down a tree, and the hatchet-head flies off, and kills a person; or where he is doing a lawful thing that may cause danger, and gives warning, after which a man is killed; these accidental killings are *chancemedley*. *Hale's Sum.* 31.

So it also is, where a master in correcting his servant, or a schoolmaster his scholar, or an officer whipping a criminal, in a reasonable manner, happens to occasion their death.

It is likewise called manslaughter by *misadventure*, for which the offender shall have his pardon of course.

Se Defendendo, is where one kills another in his own defence, being under an inevitable necessity of doing what he did.

And any person, in his just defence, may kill others for the safety of his life; but if malice be coloured under a pretence of necessity, or one kill another before he need to do it, it may be murder, or manslaughter.

If a person on some sudden falling out be attacked, and before a mortal wound is given he flies to the wall, or other unpassable place, as far as he can, to save himself, but being still pursued kills the aggressor; this is *se defendendo*.

In this *homicide* the party assaulted is not excused, unless he give back to the wall.

But if the assault be so fierce and violent, and in such a place, that giving back would endanger his life, then he need not give back, to excuse the defence. *Hale's Sum.* 41.

If A assaults B upon malice, who retreats to the wall, and then in his own defence kills A; here, if it be in the highway, he shall be discharged; but if not, it is *se defendendo*.

Though in case A retreat back to the wall, and there kills B, it is murder.

A man that kills another by misadventure, has of course his pardon: but if a person be only wounded, an action of trespass may be brought; and he shall have the same judgment as if done of malice.

For in that case the law takes notice of the

damage of the party wronged, and not of the malicious intent, as in capital cases.

Felo de se in our law, is where a man lays violent hands on and kills himself.

As in cases of murder, the death must ensue within a year and day after the stroke, &c. The act must be deliberate, and purposely done; and the person that commits it, must be of the age of discretion, and *compos mentis*, or it will not be felony.

Therefore if a lunatic, during his lunacy, one distracted by a disease, an idiot, or infant, kills himself, neither of these are *felo de se*.

A man that persuades another to kill him, does not come under this name; his assent being void in law, and the person killing him judged a murderer.

Yet it is *felo de se*, where one maliciously endeavouring to kill another, falls upon his own sword, whereby he kills himself; but here he is to be the only agent.

On a verdict found of *felo de se* before the coroner, the offender forfeits all his goods and chattels to the king, for the loss of a subject and breach of the peace: and by custom the body is buried in the highway, &c.

But the forfeiture is often saved, by the jury's favourable finding the fact to be lunacy.
Hawkins.

There is a *maihem* or maiming, that is felony by our law.

As where any person on malice forethought, and lying in wait, cuts off the nose, puts out

the eye, disables the tongue, or cuts off or disables any limb or member of another, with intent to maim or disfigure him ;

The offender, his aiders and abettors, &c., are deemed guilty of felony, without benefit of clergy ; but no such attainder shall corrupt the blood, &c. 22 and 23 *Car.* 2. c. 1.

The 43 *G.* 3. c. 58. makes it a crime of felony without benefit of clergy, when any person shall wilfully and maliciously stab or cut another with intent to murder, rob, maim, disfigure, or disable him, if such acts were committed under such circumstances as would have constituted the crime of murder, if death had ensued.

The same statute also makes it a similar offence under the same circumstances, to present or level at any one any kind of loaded arms, and attempt to discharge the same by drawing the trigger, or in any other manner with intent to murder, rob, &c., and all counsellors, aiders, and abettors.

In these cases, a voluntary act the law judges to be done out of malice ; as where one kills a person without provocation.

If a man maim or disable himself, 'tis said, he may be indicted and fined for it at the king's suit.

5. The crime of *Felony*, was formerly every capital offence, done with an evil intention, and a bitter or fierce mind.

Now we account any offence to be felony, that is in degree next to petit treason.

It is either by the *Common Law*, by the *Civil Law*, or by *Statute*.

The felony at common law is against the life of a person, as murder, manslaughter, *felo de se*, &c. or against a man's goods, such as larceny and robbery; against his habitation, as burglary, arson or houseburning; and against public justice, by breach of prison, &c.

Piracy, or murder on the sea, is felony according to the civil law, and also by our statutes.

And the felonies by statute are many, and increasing.

There are in general two sorts of felonies; the one lighter, such as for the first offence may be allowed the benefit of clergy; but the other, the greater, may not: though clergy is granted, where it is not expressly taken away by any statute.

Felony excluded clergy is punishable with loss of life, and of lands not entailed, goods and chattels; and it commonly works corruption of blood, except a statute making an offence felony, ordains it to be otherwise, which is now commonly the case.

And concerning felonies, where a person steals another's goods, not from his person, or out of his house by night, it is called *larceny*; and if the thing stolen exceeds 12*d.* value, it is grand larceny, for which the offender shall be capitally punished.

But when the theft is under that value, it

is termed petit larceny and is punished with whipping: and the jury may find the goods of less value, though a man be indicted of stealing things worth 40s. and so convict the prisoner but of petit larceny.

Not only if one steal the goods of another, it is felony; but if a third person feloniously takes them from him, such third person is a felon as to both the others.

Stealing of goods, which persons by contract are to use; or where a guest steals plate set before him at an inn or tavern; either of these are felony; those that have the charge of things, as of a chamber, &c. may be also guilty of larceny.

In case a shopkeeper delivers goods to one, who pretends to buy them, and he runs away with the things, it is felony: but if a horse be lent to a man to go to a certain place, he goes further, and then rides away with the horse, it is not larceny, because he had at first a lawful possession (a).

And yet if a carrier, after he has brought

(a) But yet it is now held to be felony if a jury find that the party, at the time of hiring, intended to convert them to their own use. So when the possession of property is obtained by any contrivance, *animo furandi*. *Leach's C. L.* 189. 206. 329. So where a coachman opens and embezzles a parcel left in a hackney coach. *Leach's C. L.* 320.

goods to the place appointed, take them away privately, it is felony ; for the possession which he had from the owner, being determined, he is a mere stranger. It is the same if he carry the things to some other place than that agreed.

Where a taylor employed to make a suit of clothes embezzles the cloth delivered to him for that purpose, it is no felony : nor is it so where a servant goes away with his master's goods, delivered him, which is only breach of trust.

This is by reason of the delivery ; but by statute, they are to be under 40s. value.

A married woman cannot be guilty of felony in stealing her husband's goods ; though if she deliver them to an adulterer, it is felony in him to receive them.

And if a feme covert commits felony in company with her husband, it shall be presumed to be done by his command and coercion, and she will be excused.

But it is otherwise where the wife steals goods alone without the knowledge of the husband ; then it is felony in her.

In felonious attempts, the least removing a thing, although it be not quite carried off, is felony ; as where one takes things out of a box, and lays them on the floor, but is apprehended before he gets away, &c. *Hale's Sum.* 64.

To steal dogs, &c. which are of base nature, is not felony ; nor deer, hares, &c. ex-

cept they are made tame: if any poultry, or fish in a trunk, are taken away, it is felony.

So now by statutes 9 *G.* 1. c. 22. hunting and killing deer in any inclosed place, robbing a warren, &c. being armed and disguised, is a capital felony. See the statutes, 42 *G.* 3. c. 107, 5 *G.* 3. c. 14. and 10 *G.* 3. c. 18.

Of particular Felonies by the Statutes.

Cutting powdike, felony within clergy. 22 *H.* 8. c. 11. s. 2. 2 & 3 *P. & M.* c. 19. *Hale's P. C.* 669. and 15 *C.* 2. c. 17. s. 13.

Petty treason, wilful murder of malice prepense, robbing churches, chapels, &c. or persons in dwelling houses, or near the highway, burning houses, or barns with corn; without clergy. Accessaries before made principals. 23 *H.* 8. c. 1. s. 3. 3 *Inst.* 352. *Dy.* 224. 11 *Co.* 29. *Bulst.* 112.

Challenging above twenty, standing mute, or not answering directly, if the indictment be for such an offence, for which the clergy is not allowed, if the party is convicted by verdict or confession, or being outlawed for an offence not within the benefit of clergy; ousted of clergy. 25 *H.* 8. c. 3.

Buggery with man or beast. 25 *H.* 8. c. 6.

Detaining persons in Cumberland, &c. against their will, and giving or receiving blackmail, felony without clergy. 43 *Eliz.* c. 13.

Stabbing, or thrusting any person that hath not then any weapon drawn, or that hath not

then stricken the party, which shall so stab, or thrust, so as the person die within six months then next following; without clergy. 1 *Jac. c. 8. s. 2. Bulst. 86. Godb. 154. pl. 204. Styl. 86, 467. Al. 43, 44. 3 Lev. 255, 256. 7 Mod. 133. 2 L. Raym. 847. Post. Cr. Law, 297.*

Levyng a fine, suffering a recovery, acknowledging a deed inrolled, statute, recognizance, bail, or judgment, in the name of another not privy to the same; without clergy. 21 *Jac. c. 26. s. 2. Ventr. 301. T. Jones, 64. Stra. 384.*

No corruption of blood, wife loseth not her dower. Bail taken, but not filed, not within this act. But since made felony by 4 *W. & M. c. 4. s. 4. but within clergy.*

Concealing the death of a bastard child, without clergy. 21 *Jac. c. 27. Kel. 33. Gilb. Evid. 271. 2 Hawk. P. C. 438. 2 Hale P. C. 288, 289. Law Evid. 274. pl. 41. Barrington's Observations on the Statutes, 318. But see 43 G. 3. c. 58.*

Transporting wool out of England, Wales, or Ireland, within clergy. 13 & 14 *Car. 2. c. 18. By 7 & 8 W. 3. c. 28. making it felony is repealed, and it is reduced to a misdemeanor, which by that and later statutes is subjected to severe penalties.*

Great, known, and notorious thieves and spoil-takers in the counties of Northumberland and Cumberland, without clergy. 18 *Car. 2. c. 3. s. 2. made perpetual by 32 Car.*

2. c. 2. s. 2. Offender may be transported, see 17 G. 2. c. 40.

Cutting and taking, stealing or carrying away any cloth, or other woollen manufactures, from the rack or tenter, in the night time, and 15 G. 2. c. 2. post. Or committing any offence against 31 *Eliz.* c. 4. Or feloniously stealing any of his majesty's sails, cordage, or any other naval stores to the value of 20*s.* without clergy. 22 *Car.* 2. c. 5. s. 3. By 15 *Geo.* 2. c. 27. third offence is only transportation for seven years.

Unlawfully cutting out or disabling the tongue, of malice forethought, and by lying in wait, putting out an eye, slitting the nose, cutting off a nose or lip, or cutting off or disabling any limb or member of any other person, with intention to maim or disfigure; without clergy. Accessories before made principals. No corruption of blood or forfeiture. 22 & 23 *Car.* 2. c. 1. s. 7. See 6 vol. *Stat. Tri.* 212. *Coke and Woodburne's Case* on this act, for slitting the nose of Mr. Crispe; they were both convicted and executed. See also the stat. 43 *Geo.* 3. c. 58. *suprà*, 37.

Maliciously, unlawfully, and willingly burning any stacks of corn, hay, or grain, barns, or other houses, or buildings, or kilns, within clergy. 22 & 23 *Car.* 2. c. 7. s. 2. See 9 *Geo.* c. 22.

But liberty is given to the offenders to chuse transportation for seven years. Re-

turning within the time, without clergy.
Sect. 4.

No corruption of blood, loss of dower, or disherison of the heir. Sect. 3.

Mariner laying violent hands on his commander, to hinder him from fighting in defence of his ship, and goods committed to his trust, 22 & 23 *Car. 2. c. 11. s. 9.* without clergy. Stat. 11 & 12 *W. 3. c. 7.*

Captain, master, mariner, or other officer, belonging to any ship, wilfully casting away, burning or otherwise destroying the ship unto which he belongeth, or procuring the same to be done, 22 & 23 *Car. 2. c. 11. s. 12.* without clergy, stat. 1 *An. ses. 2. c. 9. s. 4. 12 An. ses. 2. c. 18 (a).*

Feloniously taking away any goods, &c. being in any dwelling house, any person being therein, or put in fear, or robbing any dwelling house in the day-time, any person being therein, or breaking any dwelling-house, shop, or warehouse, thereunto belonging, in the day-time, and taking away any goods, &c. to 5*s.* value, although no person therein. Accessories before and after made principals. Without clergy. 3 *W. & M. c. 9.* made per-

(a) 4 *G. 1. c. 12*, and 11 *G. 1. c. 29*, are repealed by 43 *G. 3. c. 113*; and it is made a capital felony, to cast away, burn, or destroy, any ship; or counsel or direct the same to be done, with intent to defraud the insurers.

petual by 6 & 7 W. 3. c. 14. See *Fost. Cr. Law*, 78. *Barrington's Observations on the Statutes*, 289.

Taking away, with intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement are to be used, or let to use, in or with any lodging, (if above twelve pence value,) without clergy. 3 W. & M. c. 9. s. 5.

Personating another before those who have authority by this act to take bail, so as to make him liable to the payment of any sum of money in that suit or action; without clergy. 4 W. and M. c. 4. s. 4.

The forging or counterfeiting the tickets in the several lotteries by virtue of divers acts of parliament, or standing orders or receipts given out in pursuance of the said act, or altering the number or principal sum thereof, or counterfeiting the hand of any person to such order; or the bringing any such forged ticket, &c. (knowing it to be so) to the managers, &c. with intent to defraud his majesty, or any contributors; without clergy. 5 and 6 W. and M. c. 7, and the several lottery acts.

Forging any of the stamps by virtue of divers acts of parliament, or counterfeiting or resembling the impression of the same, upon any vellum, parchment, or paper, or uttering, vending, or selling any vellum, &c. with such counterfeit impression, knowing the same to be so, or using any stamps or marks with intent to defraud the crown of the stamp duty;

without clergy. 5 and 6 *W. and M. c.* 21. s. 11. 41 *G. 3. c.* 86. s. 16. and the several stamp acts.

The counterfeiting exchequer bills, or any indorsement thereon, or tendering such counterfeit bills or indorsement, knowing the same to be counterfeit, with intention to defraud his majesty, or any other person; without clergy. 7 and 8 *W. 3. c.* 21. s. 78; the several acts for issuing them; 48 *G. 3. c. 1. s.* 9; and 30 *G. 2. c. 3. s.* 156.

Forging the common seal of the bank, or any bank bill, bank note, bank bill of exchange, or dividend warrant, or any bond or obligation under the common seal, or altering or erasing any such bank bill, note, &c., or altering or erasing any indorsement on any bank bill, note, &c. or demanding to have the same exchanged for ready money, knowing the same to be forged, erased, or altered, or tendering the same in payment, knowing it to be forged, &c.; without clergy. 8 and 9 *W. 3. c.* 20. s. 36. 7 and 8 *W. 3. c.* 31. s. 36. 3 *Wilson's Rep.* 439. *Stra.* 18. And see statutes 11 *G. 1. c.* 9. s. 6. 12 *G. 1. c.* 32; 15 *G. 2. c.* 13. 12 *G. 3. c.* 79. and 45 *G. 3. c.* 89. s. 1.

Blanching copper for sale, or mixing blanching copper for silver, or knowingly and fraudulently buying or selling, or offering to sale, any malleable composition of mixture of metals, or minerals heavier than silver, and look and touch and wear like standard gold, but

manifestly worse than standard, or receiving, paying, putting off, any counterfeit or unlawfully diminished milled money (not cut in pieces) at a lower rate than it imports, or was coined, or counterfeited for; within clergy. 8 and 9 *W. 3. c. 26*, *s. 6*, made perpetual by 7 *Ann. c. 25.* and 15, and 16 *G. 2. c. 28.*

Any person or persons, privately by night or by day, stealing goods in any shop, warehouse, &c. (a), of five shillings value, or more, though such shop, warehouse, &c. be not actually broke open; and although the owner of the goods, or any other person, be not in such shop, warehouse, &c. to be put in fear; accessaries before made principals. 2 *Hawk. P. C. 350.* Without clergy. 10 and 11 *W. 3. c. 23.* The goods of another stolen out of a shop, is not felony within this statute. 8 *Mod. 165.* See the case of John Howard on this statute in *Fost. Cr. Law. 77.*

Not only setting out pirates, but assisting in, or advising any piracy, or receiving, or concealing any pirate; without clergy. 11 and 12 *W. 3. c. 7.* made perpetual by 6 *Geo.*

(a) See the statutes 5 and 6 *Ed. 6. c. 9.* 3 and 4 *W. and M. c. 9.* 12 *Ann. 1. c. 7.* and 2 *G. 2. c. 25.* which last makes the stealing of bank notes, and other *choses in action* therein mentioned, a felony of the same nature as stealing other property of the value of the note. *Leach's C. L. 798.*

c. 19. extended by stats. 8 G. 1. c. 24. and 18 G. 2. c. 30.

Any owner of, captain, master, officer, or mariner, belonging to any ship or vessel, wilfully casting away, burning, or otherwise destroying the ship or vessel, of which he is owner, or to which he belongeth, or in any wise procuring the same to be done to the prejudice of any underwriter of any policy of insurance, or of any merchant who shall load goods thereon, or of any owner of such ship; without clergy. 1 *Ann.* sess. 2. c. 9. s. 4. and 43 G. 3. c. 113. *suprà*.

Officer or soldier beyond sea, raising any mutiny, or resisting his officer, &c.; without clergy. 2 and 3 *Ann.* c. 20. s. 35.

Receiver of stolen goods, knowing them to be stolen, guilty of felony as accessaries; transportation for fourteen years. 5 *Ann.* c. 31. s. 5. 8 *Mod.* 264. *Fost. Cr. Law.* 373. And see 29 G. 2. c. 30. 22 G. 3. c. 5. 10 G. 3. c. 48. 25 G. 2. c. 36.

Assaulting, wounding, or attempting to kill a privy counsellor in the execution of his office; without clergy. 9 *Ann.* c. 16.

Forging or counterfeiting the common seal of the South Sea company, or forging, counterfeiting, or altering, any of their bonds, or knowingly tendering or offering to dispose of the same, with intent to defraud any person; without clergy. 9 *Ann.* c. 21. s. 57. 6 G. 1. c. 4. s. 56. c. 11 s. 50. 12 G. 1. c. 32. s. 9.

Feloniously stealing any money, goods, or

merchandizes to the value of 40s. being in any dwelling house or out-house thereunto belonging, although it be not broke open, nor any person be therein; without clergy. 12 *Ann. st. 1. c. 7.*

Officers and servants secreting or embezzling any note, bill, bond, deed, warranty, money, or effects, belonging to the company, is by statute 24 *G. 2. c. 11.* guilty of felony without benefit of clergy.

Twelve persons or more, being unlawfully and riotously assembled, continuing together for the space of one hour, after proclamation made to depart, opposing or hindering the reading the proclamation, or continuing to the number of twelve, for one hour, after such hindrance so made, having knowledge thereof; any person unlawfully and riotously assembled, with force pulling down, or beginning to pull down, any church or chapel, or building for religious worship, allowed by the toleration act, or any dwelling house, barn, stable, or other out-house; without clergy. 1 *G. stat. 2. c. 5.*

Malicious setting on fire or burning any wood, underwood, or coppice, or any part thereof, within clergy. 1 *G. sess. 2. c. 48.*

If any offender, ordered for transportation beyond sea, shall return to, or (by 6 *G. c. 23.*) be found at large in Great Britain or Ireland, without some lawful cause, before the expiration of his term, without licence from his majesty, without clergy. 4 *G. c. 11. s. 2.* and extended to every case by 24 *G. 3. c. 56.*

Taking any money or reward under pretence of helping any person to stolen goods (unless he apprehend the felon, and give evidence against him at his trial), shall be guilty of felony, and shall suffer in the same manner, as if he had stolen them himself, with such circumstances as the same were stolen. 4 G. 1. c. 11. s. 4.

Persons imprisoned for exportation of wool, &c. refusing to plead, and judgment being entered against them by default, not paying the sum recovered, transportation for seven years; returning before the expiration of the term; without clergy. Sect. 6. (a).

Pirates adjudged so by 11 & 12 W. 3. c. 7. may be tried according to 28 H. 8. c. 15. and are without clergy. Sect. 7. So also persons supplying them with stores or ammunition by statute 8 G. 1. c. 24.

Counterfeiting or forging any stamp or seal on leather, which in pursuance of this act shall be so (as therein mentioned) directed or ordered, or counterfeiting or resembling

(a) By 28 Geo. 3. all former statutes respecting the exportation of wool or sheep are repealed, and this offence is punishable with a fine of 3*l.* for every sheep, and three months' solitary imprisonment; and for wool 3*s.* for every lb., or 50*l.* in the whole, at the election of the prosecutor, and the same imprisonment; but this does not extend to sheep or wool carried coastwise.

the impression of any such stamps or seal so directed or ordered, on any hide, skin, piece of any hide or skin, vellum, or parchment, or uttering, vending, or selling any hide or skin, &c. with such counterfeit mark, or impression thereupon, knowing such mark or impression to be counterfeited, shall render the offender liable to the penalties and forfeiture of 9 *Ann.* c. 11. sect. 44. whereby clergy is excluded. 5. *Geo.* c. 2. s. 9.

Altering, forging, or counterfeiting, any South Sea receipt for a subscription to the stock, or warrant for a dividend, or any indorsement or writing thereon, or knowingly tendering or offering to dispose of the same, with intent to defraud any one; without clergy. 6 *Geo.* c. 11. sect. 50. and 8 *Geo.* 1. c. 22. s. 1.

Counterfeiting the corporation seal of either of the assurance companies, now known by the name of the Royal Exchange and the London Assurance, or altering any policy, bill, bond, or other obligation, under their common seal, or knowingly paying away such policy, &c. or demanding the money thereon: without clergy. 6 *Geo.* c. 18. sect. 13. and 14 *Geo.* 2. c. 37.

Offender against this act being transported, returning within time, without clergy. 6 *Geo.* c. 21. s. 35.

Persons contracting to transport felons, and to whom any felons shall be delivered to be transported, may, in such manner as they shall think fit, carry and secure the said fe-

lons towards the sea port from whence they are to be transported; and if any person shall rescue such felons, or assist them in making their escape, he shall be guilty of felony, and suffer death without benefit of clergy. 6 *Geo. c. 23. s. 5.*

The wilful and malicious tearing, spoiling, cutting, burning, or defacing, the garments or clothes of any person, in the streets or highways, transportation for seven years. 6 *Geo. c. 23. s. 11.*

Persons found passing knowingly with foreign goods, landed from any ship without due entry and payment of duties, in their custody, from any of the coasts, or within twenty miles thereof, and shall be more than five in company, or shall carry offensive arms, or wear any disguise, or shall forcibly resist any officers of the customs or excise in the seizing of run goods, shall be deemed runners of foreign goods; and being convicted shall be adjudged guilty of felony, and be transported for seven years; and if such offenders shall return into Great Britain or Ireland, before the expiration of the seven years, they shall have execution awarded as persons attainted of felony; within clergy. 8 *G. c. 18. s. 6.* continued by 43 *G. 3. c. 29. s. 9.*

Counterfeiting the name of any proprietor, forging, or procuring to be forged, or wilfully acting and assisting in forging, a letter of attorney, or other instrument to transfer any share in the capital stock of any corporation established by act of parliament, or receiving

any annuity or dividend attending such share or assignments, or falsely personating any proprietor for the purposes aforesaid ; without clergy. 8 G. c. 22. 31 G. 2. c. 22. s. 77 ; 4 G. 3. c. 25. 33 G. 3. c. 30. and 37 G. 3. c. 122.

Appearing in any forest, chase, park, &c. or in any high road, open heath, common, or down, with offensive weapons, and having his face blacked, or otherwise disguised, or unlawfully and wilfully hunting, wounding, killing, or stealing, any red or fallow deer, or unlawfully robbing any warren, &c. or stealing any fish out of a river or pond, or (whether armed and disguised or not) breaking down the head or mound of any fish pond, whereby the fish shall be lost or destroyed, or unlawfully and maliciously killing, maiming, or wounding, any cattle ; or cutting down or otherwise destroying any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit ; or setting fire to any house, barn, or outhouse, hovel, cock, mow, or stack, of corn, straw, hay, or wood ; or maliciously shooting at any person, in any dwelling house or other place, [see case of *Edward Arnold*, who was tried for shooting at Lord *Onslow*, 8 vol. *State Tri. Fortesc. Rep.* 388.] Or knowingly sending any letter without any name, or signed with a fictitious name, demanding money, venison, or other valuable thing, [see 30 G. 2. c. 24.] or forcibly rescuing any persons being

in custody, for any of the offences before mentioned; or procuring any person by gift or promise of money, or other reward, to join in any such unlawful act; or concealing or succouring such offenders, when by order of council, &c. required to surrender; without clergy. 9 G. c. 22. made perpetual by 31 G. 2. c. 42. s. 2. No corruption of blood, loss of dower, or forfeiture. See 2 *Stra.* 1247. But the law on this head is now contained in the amended statutes of 16 G. 3. c. 30. and 42 G. 3. c. 107.

Wilfully obstructing any person, serving or endeavouring to serve or execute any writ, warrant, or legal process, &c. within the place, commonly called the mint, or the pretended limits thereof, or assaulting or abusing any person for having so done, whereby he shall receive any damage or bodily hurt, or rescuing or knowingly harbouring or concealing any prisoner taken upon such process, or presuming to exercise any unlawful jurisdiction, for supporting the pretended privilege within the said place; transportation for seven years. 9 G. c. 28. and 11 G. 1. c. 22.

Joining or abetting any riot, or opposing the execution of any legal process, &c. within the limits aforesaid, wearing any vizard, &c. or having his face or body disguised, &c. without clergy. Sect. 3. now by 11 G. 1. c. 22. made felony without benefit of clergy.

And aiding or abetting, concealing or hap-

bouring, such disguised person, transportation.

The same provision is made against most of the said offences, if committed within the hamlet of Wapping, Stepney, or any other place within the bills of mortality, whereof presentment shall have been made by the grand jury, at a general or quarter sessions. 11 G. c. 2.

Forging or counterfeiting the name or hand of the accountant general of the court of chancery, the register clerk of the report office, or any of the cashiers of the bank of England, to any certificate, report, &c. or any East India bond or indorsement thereon, or any indorsement on any South Sea bond; without clergy. 12 G. c. 32. s. 9.

Accessaries made principals.

Assaulting any master woolcomber, or master weaver, or other person concerned in the woollen manufacture, whereby he shall receive any bodily hurt, for not complying with any such illegal bye laws (as in the act mentioned), or writing, or sending any threatening letter to such person for not complying with such illegal bye laws, or with any demands or pretences of his workmen, or others employed by him in the woollen manufacture; transportation for seven years. 12 G. c. 34.

Maliciously cutting or destroying any woollen goods in the loom or on the rack, or destroying any rack, on which such goods are hanged, in order to dry, or wilfully

breaking any tool used in the making such woollen goods, not having the consent of the owner so to do, or breaking or entering by force into any house or shop, by night or by day, for any of the purposes aforesaid; without clergy. Sect. 7. and 15 G. 2. c. 27.

Wilfully and maliciously burning, blowing up, pulling down, or otherwise destroying Bridges or any part thereof, or attempting so to do, or removing or taking away, (without lawful authority) any of the works, or directing or procuring the same to be done; without clergy (a).

Persons being convicted a second time; (of the offences in the act mentioned) or by day or night wilfully and maliciously pulling down or demolishing any lock, sluice, or flood-gate, erected by parliament, upon any navigable river; transportation for seven years! 1 G. 2. st. 2. c. 19. s. 2. and see 27 G. 2. c. 16. and 4 G. 3. c. 12.

The forging or counterfeiting any deed, will, bond, writing obligatory, bill of exchange, promissory note for payment of money, or any acquittance or receipt for the money or goods; or knowingly uttering or publishing as true, any forged deed, &c. with intention to defraud any person; with-

(a) This is a clause now inserted in every act for the erection of bridges. The like as to ferries.

out clergy. 2 G. 2. c. 23. made perpetual by 9 G. 2. c. 18. 15 G. 2. c. 13. s. 12.

Accessaries before made principals.

Persons convicted of wilful and corrupt perjury, or subornation of perjury, transportation for seven years.

Escaping, breaking prison, returning within the term, without clergy. 2 G. 2. c. 25. s. 2. see 24 G. 3. c. 56.

Stealing or taking by robbery, exchequer orders, tallies, or other orders, entitling any person to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, South Sea bonds, East India bonds, dividend warrants of the bank, South Sea company, East India company, or any other company, society, or corporation, bills of exchange, navy bills or debentures, goldsmiths' notes for payment of money, or other bonds or warrants, bills or promissory notes, for the payment of any money, being the property of any person, or corporation, is felony of the same nature, and in the same degree, as if the money secured by such bonds, &c. and remaining unsatisfied, had been stolen or taken by robbery. 2 G. 2. c. 25. s. 3.

Attainder for any offence hereby made felony, shall not work any corruption of blood, loss of dower, or disherison of heirs. 2 G. 2. c. 25. s. 5.

Falsely making, forging, or counterfeiting, (within Great Britain or Ireland, or any other his majesty's dominions, or without) any pass for any ship whatsoever, commonly

called a Mediterranean pass, or counterfeit-
ing the seal of the office, or of the hand of
the lord high admiral of Great Britain or
Ireland for the time being, or of any com-
missioner or commissioners for executing
the said office, to any such pass, or altering or
erasing true and authentic passes issued or
made out as aforesaid, or uttering or publish-
ing as true, any such false, forged, coun-
terfeited, altered, or erased pass, knowing
the same to be false, &c. without clergy.
4 G. 2. c. 18.

Stealing, ripping, cutting, or breaking,
with intent to steal, any lead, iron bar, iron
gate, iron palisado, or iron rail fixed to any
dwelling house or other building used with
such dwelling house; transportation for seven
years. Accessories before made principals.
4 G. 2. c. 32.

Bankrupts not surrendering themselves to
the commissioners within 42 days after no-
tice in the London Gazette; (but lord chan-
cellor, &c. may enlarge the time to 60 days)
and submitting to be examined upon oath (ex-
cept quakers whose affirmation is sufficient),
and truly discovering how their estates and
effects are disposed, &c. and all books and
writings relating thereunto, &c. and alsq de-
livering up all their effects, estates, books,
&c. in their custody, when examined, or
removing or concealing their effects to
the value of 20*l*.; without clergy. 5 Geo. 2.
c. 30. continued to Sept. 1771, by 4 Geo.
c. 36.

Offenders against this act are excepted out of the general pardon of 20 Geo. 2. c. 52. See *Christian's Bankrupt Laws*.

Wilfully and maliciously breaking down, cutting down, plucking up, throwing down, levelling, or otherwise destroying, either by day or night, any turnpike gate, post, rail, wall, or fence, belonging to any turnpike erected to prevent passengers from passing by without paying the toll, directed to be paid by any act of parliament; transportation for seven years. 5 Geo. 2. c. 33. s. 2. made perpetual by 27 Geo. 2. c. 16. (and see 13 Geo. 3. c. 78. s. 52.)

Maliciously breaking or cutting down the bank of any river, or any sea bank, whereby any lands shall be overflowed or damaged; without clergy. 6 Geo. 2. c. 37. s. 5. made perpetual by 31 Geo. 2. c. 42. s. 3. (See also 10 Geo. 2. c. 32. s. 5. 27 Geo. 2. c. 16. and 42 Geo. 3. c. 32. s. 4.)

And by section 6. made perpetual by section 4. of the above perpetual statute,

Unlawfully and maliciously cutting any hopbinds, growing on poles, in any plantation of hops; without clergy.

Unlawfully and maliciously assaulting with any offensive weapon or instrument, or by menaces, or by any forcible or violent manner demanding money, goods, or chattels, of any person, with a felonious intent to commit robbery on such person; transportation for seven years. 7 Geo. 2. c. 21.

Forging or counterfeiting any entry of the

acknowledgment of any bargainer in such bargain and sale, (as mentioned in this act, which is for the public registering all deeds, conveyances, &c., in the North Riding in the county of York), or any such memorial, certificate, or indorsement, as herein mentioned or directed, incurs the penalties of 5 *Eliz.* c. 14. 8 *Geo.* 2. c. 6. s. 31.

Enlisting or entering himself, or hiring or retaining any of his majesty's subjects, with intent to cause such person to enlist or enter himself, or procuring any of his majesty's subjects to go beyond seas, or embark with intent to be enlisted, to any foreign prince, &c. as a soldier, without his majesty's leave or licence; without clergy. 2 *Geo.* 2. c. 30. (see also 9 *Geo.* 2. c. 30. enforced by 29 *Geo.* 2. c. 17.)

Any person who hath been guilty of any of the offences in this act before-mentioned, for which he is by any law now in being, liable to be transported as a felon, taking the benefit of this present act for any of the said offences, and afterwards being guilty of any of the said offences for which he is liable to be transported as aforesaid; every such person (being duly convicted of any of the said offences hereafter to be committed as aforesaid, and upon due proof made that such person had committed any of the said offences before the making of this act, and had taken the benefit thereof for his discharge,) without clergy. 9 *Geo.* 2. c. 35. s. 7.

Being assembled to assist in the running,

rescuing, or carrying away, prohibited or uncustomed goods, transportation for seven years; returning before the expiration of such term, without clergy. 9 *Geo. 2. c. 35. s. 10.* and appearing in disguise and resisting officers, see 19 *Geo. 2. c. 43.* and *Fost. Cr. Law. 51.*

Forcibly hindering, opposing, obstructing, wounding, or beating, any officer of the customs or excise, being on board any ship, boat, or vessel, within the limits of any of the ports of this kingdom, in the execution of his office, either in the day or night, transportation for seven years; returning before the expiration of the term, without clergy. Accessories before made principals. 9 *Geo. 2. c. 25. s. 28.* (and see the subsequent statutes. 19 *Geo. 3. c. 69. s. 23.* and 24 *Geo. 3. c. 47.*

Watermen taking more passengers into their boat than 37, and three by the way, if a tilt-boat; or more than eight, and two by the way, if any other boat; or more than eight in a ferry-boat on Sundays, in case any passenger be drowned; transportation. 10 *Geo. 2. c. 31. s. 9.*

Wilfully and maliciously setting on fire any mine, pit, or delph of coal or cannel coal; without clergy. Accessories before made principals. 10 *Geo. 2. c. 32. s. 6.* made perpetual by 31 *Geo. 2. c. 42. s. 5.* and further extended to destroying machines belonging thereto, by *stat. 9. Geo. 3. c. 29.*

Wilfully and maliciously pulling, throwing down, or otherwise destroying, any store-

house or granary, or other place where corn shall be then kept to be exported, or unlawfully entering any such store-house, &c., and taking and carrying away any corn, flour, meal, or grain therefrom, or throwing abroad or spoiling the same, or any part thereof, or unlawfully entering on board any ship, &c., and wilfully and maliciously taking and carrying away, casting or throwing out therefrom, or otherwise spoiling or damaging any meal, flour, wheat, or grain therein, intended for exportation; transportation for seven years. No corruption of blood, loss of dower or disherison of heirs; returning, &c., without clergy. 11 *Geo. 2. c. 22, s. 2.*

Riotously rescuing offenders, in retailing spirituous liquors, or assaulting informers, transportation for seven years. 11 *Geo. 2. c. 26. s. 2.*

Feloniously driving away, or in any other manner feloniously stealing, one or more sheep, or other cattle, of any other person whatsoever, with a felonious intent to steal the whole carcass or carcasses, or any part thereof, or any part of the carcass or carcasses of any one or more sheep, or other cattle so killed, accessories before made principals; without clergy. 14 *Geo. 2. c. 6. (15 Geo. 2. c. 34.)*

Officer or servant of the bank of England, entrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects, belonging to the said bank, or having any bill, &c., of any other person lodged with the said bank, or with him as an

officer or servant to the said bank, secreting, embezzling, or running away with, any such note, &c.; without clergy. 15 Geo. 2. c. 13. s. 12.

Uttering or tendering in payment any false or counterfeit money, knowing the same to be false and counterfeit, third conviction; without clergy. 15 G. 2. c. 37. s. 2. (so giving it in exchange, paying, or putting it off. 37 G. 3. c. 126 s. 4.)

Uttering or tendering in payment the same day, or within ten days, any more or other false or counterfeit money, knowing the same to be false or counterfeit; or at the time of uttering or tendering, having about him one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, afterwards again uttering or tendering in payment any false or counterfeit money, knowing the same to be false, second offence; without clergy. 15 G. 2. c. 28. s. 3.

Blood is not to be corrupted. S. 4.

Felons ordered for transportation, or agreeing to transport themselves, returning before the expiration of the term; without clergy. 16 G. 2. c. 15.

Apprehenders of them intitled to 20%. reward on conviction. S. 3.

Aiding or assisting any prisoner to attempt his escape (though no escape be actually made,) if attainted or convicted of treason or any felony (except petty larceny,) or committed for treason or any felony, except, &c. 16 G. 2. c. 31.

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Conveying or causing to be conveyed into any goal or prison, any visor, or other disguise, or any instrument or arms proper to facilitate the escape of prisoners; and the same shall deliver or cause to be delivered to any prisoner in any such goal, or to any other person there, for the use of such prisoner, without the consent or privity of the keeper or underkeeper of any such goal or prison; and every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such visor or other disguise, instrument, or arms, with an intent to aid and assist such prisoners to escape or attempt to escape, if the prisoner was attainted or convicted of treason or any felony, except petty larceny, expressed in the warrant of commitment or detainer; transportation for seven years. Returning before the expiration of the term, without clergy. 16 G. 2. c. 31. s. 2.

Aiding or assisting any prisoner to attempt to make his escape from the custody of any constable, headborough, tithingman, or other officer, or person who shall then have the lawful charge of such prisoner, in order to carry him to gaol, by virtue of a warrant of commitment for treason or any felony, (except petty larceny, expressed in such warrant,) or aiding or assisting any felon to attempt to make any escape on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felon, his assigns, or

agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation, transportation for seven years; returning before the expiration of the term, without clergy. 16 G. 2. c. 31. s. 3.

Any incorrigible rogue, breaking out or escaping from the house of correction, before the expiration of the time for which he or she has been committed by the justices of peace at the general or quarter sessions, shall be deemed guilty of felony, and being convicted, shall be transported for any time not exceeding seven years. 17 G. 2. c. 5. s. 9.

Feloniously stealing by day or night, any linen, fustian, calico, cotton cloth, or cloth worked, woven, or made of any cotton, or linen, yarn mixed, or any thread, linen, or cotton yarn, linen or cotton tape, incle, filleting, laces, or any other linen, fustian, or cotton goods, or wares whatsoever, laid, placed, or exposed to be printed, whitened, bowked, bleached, or dried, in any whitening or bleaching croft, lands, fields, or grounds, bowking-house, or drying-house, printing-house, or other building, ground, or place, made use of by any calico printer, whitster, grofter, bowker, or bleacher, for printing, whitening, bowking, bleaching, or drying of the same to the value of ten shillings; without clergy; accessories before made principals. 18 G. 2. c. 27.

The court may order such offenders to be transported for fourteen years. Breaking the

gaol, or returning before the expiration of the term; without clergy. S. 2.

Any person to whom his majesty has, or shall hereafter grant his most gracious pardon for the treasons in this act mentioned, on condition of their being transported, without the licence of his majesty, his heirs, or successors, under his privy seal, or sign manuel, or some other lawful cause, returning or being at large, in any part of Great Britain or Ireland, or voluntarily going into, or continuing in any part of the dominions of the French king, or king of Spain; without clergy. 20 G. 2. c. 46.

Knowingly aiding or assisting any such person so pardoned, or to be pardoned on condition of transportation as aforesaid, in his unlawful returning, &c. into Great Britain or Ireland, or going into, &c., without such licence, or other lawful cause; without clergy. 20 G. 2. c. 46. s. 2.

Any of his majesty's subjects, his heirs, or successors, (except such as are licensed) within this realm, or without, knowingly holding, entertaining, or keeping any intelligence or correspondence in person, or by letters, messages, or otherwise, with any of the said persons who shall have gone into, or continued in any of the dominions of the French king, or the king of Spain, or any person or persons employed by him or them, knowing such persons to be employed; without clergy. 20 G. 2. c. 46. s. 3.

Rescuing offenders against the acts for re-

straining the retailing spirituous liquors; transportation for seven years. 24 G. 2. c. 40. s. 28.

Persons convicted of theft of forty shillings value on board any vessel, or on any wharf; without clergy. Accessaries before made principals. 24 G. 2. c. 45. See the case of George Grimes on this statute, in *Post. Cr. Law*, 79. in notes.

The entering any mines of black lead, with an intent to steal the same; commitment to gaol for a year, and public whipping, or transportation for seven years. Returning within the term; without clergy. 25 G. 2. c. 10.

Setting at liberty by force, or rescuing, or attempting to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder, or going to execution, or during execution; without clergy. 25 G. 2. c. 37. s. 9.

By force rescuing or attempting to rescue the body of such offender out of the custody of the sheriff, or his officers, after the above execution had, or from the company of surgeons, or their officers or servants, or from the house of any surgeon where the same shall have been deposited in pursuance of this act; transportation for seven years. Returning before the expiration of the term; without clergy. 25 G. 2. c. 37. s. 10.

Not performing orders, &c., touching quarantine in time of the plague, excluded

clergy. See 26 G. 2. c. 6. s. 2, 3, 8, 10, 17, 18.

Plundering, stealing, taking away, or destroying any goods, merchandize, or other effects, from or belonging to any ship or vessel of his majesty's subjects, or others, which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore, in any part of his majesty's dominions, (whether any living creature be on board such vessel or not,) or any of the furniture, tackle, apparel, provision, or part of ship or vessel, or beating, wounding, with intent to kill or destroy, or otherwise wilfully obstructing the escape of any person endeavouring to save his life from such ship or vessel, or the wreck thereof, or putting out any false lights, with intention to bring any ship or vessel into danger; without clergy. 26 G. 2. c. 19.

Solemnizing matrimony in any other place than a church or public chapel, where banns of marriage have been usually published, unless by special licence from the archbishop of Canterbury, or without publication of banns, unless licence of marriage be first obtained from some person having authority to grant the same; transportation for seven years. 26 G. 2. c. 33. s. 8.

Knowingly and willingly inserting or causing to be inserted, in the register book of such parish or chapelry, as mentioned in this act, any false entry of any matter or thing relating to any marriage, or falsely making, altering, forging, or counterfeiting, or

causing or procuring to be falsely made, &c., or acting or assisting in falsely making, &c., any such entry in such register, or causing or procuring to be falsely made, &c., or assisting in falsely making, &c., any such licence of marriage as aforesaid, or uttering or publishing as true, any such false, altered, forged, or counterfeited register, as aforesaid, or a copy thereof, or any such false, &c. licence of marriage, knowing such register or licence of marriage to be false, &c. or wilfully destroying, or causing or procuring to be destroyed, any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; without clergy. 26 G. 2. c. 33. s. 16.

Knowingly sending any letters without any name subscribed thereto, or signed with a fictitious name, threatening to kill or murder any person, or to burn their houses, out-houses, &c., though no money, venison, or other valuable thing be demanded thereby; or rescuing persons in custody for such offences; without clergy. 27 G. 3. c. 15.

A prisoner or any person taking the benefit of this act, forswearing or perjuring himself in any of the matters thereof; without clergy. 28 G. 2. c. 13, s. 17.

A prisoner neglecting or refusing to deliver in and subscribe such schedule (mentioned in the act) within forty days; without clergy. S. 30.

Wilfully destroying any of the engines to

be erected by this act, which is for draining Bedford Level; within clergy. 29 G. 2. c. 22. s. 22.

Buying or receiving lead, iron, copper, brass, bell-metal, or solder, knowing it to be stolen, or unlawfully come by, &c. transportation for fourteen years. 29 G. 2. c. 30.

Personating an officer or seaman, supposed to have wages due to him, or his executors, relation, or creditor, or forging letters of attorney, tickets, certificates, or wills, or making a false oath to obtain the probate of any will, or order to receive the wages, &c., of such person; without clergy. 31 G. 2. c. 10. s. 24.

Any officer of the post-office secreting or embezzling any letter with any bank bill or note, &c., therein, or taking out any such note or bill; robbing the mail, although such robbery shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling-house, or any coach-house, stable, barn, or any outhouse belonging to a dwelling-house, and although it shall not appear that any person was put in fear; officer, &c., embezzling or misapplying the postage money received by him, or destroying any letter or packet, or advancing the rates, and not accounting for the same; within clergy. 5 G. 3. c. 25. (And see for robbing the mail, &c. 7 G. 3. c. 50.)

Casting, forging, or counterfeiting any mark or stamp used, or to be used, for making

gold or silver plate in pursuance of 12 G. 2. c. 26. or any act or acts of parliament now in force, by the company of goldsmiths in London, or by the wardens, or assayer, or assayers at York, Exeter, Bristol, Chester, or Newcastle-upon-Tyne, or by any maker or worker of gold or silver plate, or any or either of them; or casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark, stamp, or impression, in imitation of, or to resemble any mark, &c., made or to be made, with any mark or stamp used, or to be used as aforesaid, by the said company of goldsmiths, &c., or marking or stamping, or causing or procuring to be marked or stamped, any wrought plate of gold or silver, or any wares of brass, or other base metal, silvered or gilt over, and resembling plate of gold or silver, with any mark or stamp which hath been or shall be forged or counterfeited, in imitation of or to resemble any mark or stamp used or to be used as aforesaid, by the said company of goldsmiths, &c., or transposing, removing, or causing or procuring to be transposed or removed from one piece of wrought plate to another, or to any vessel of such base metal as aforesaid, any mark, &c., made or to be made, by or with any mark, used or to be used, as aforesaid, by the said company of goldsmiths, &c. Or selling, exchanging, exposing to sale, or exporting out of the kingdom, any wrought plate of gold or silver, or any vessel of such base metal as aforesaid, with any such forged or counterfeit mark, &c., thereon, or any mark, &c., which

hath been, or shall be transposed, or removed from any other piece of plate; knowing such mark, &c., to be forged, counterfeited, transposed, or removed, as aforesaid, or wilfully and knowingly having, or being possessed of any mark or stamp, which hath been or shall be forged or counterfeited in imitation of, to resemble any mark or stamp used or to be used as aforesaid by the said company of goldsmiths, &c., within clergy. 31 G. 2. c. 32. s. 15.

Making, forging, or counterfeiting, or causing, &c., to be made, &c., the mark or hand of the receiver of post fines, whereby he or any other person may be defrauded, or suffer any loss thereby; without clergy. 32 G. 2. c. 14. s. 9.

Wilfully or maliciously setting fire to, burning, or otherwise destroying, any engines to be erected by virtue of this act, which is for the preserving fen lands, &c.; transportation for seven years. 33 G. 2. c. 32. s. 27. 4 G. 3. c. 12. s. 5.

Personating or falsely assuming the name or character of, or procuring any other to personate or falsely to assume the name or character, of any person intitled, or supposed to be intitled, as an out-pensioner, to any out-pension or allowance of money from the commissioners or governors of Greenwich hospital, in order to receive the money due, or supposed to be due on such out-pension; without benefit of clergy. 3 G. 3. c. 16. s. 6.

Counterfeiting the hand writing of any person in the superscription of any letter or

packet to avoid the postage; transportation for seven years. 4 G. 3. c. 24. s. 8. 5 G. 3. c. 25. s. 22, 23, 24. (So franks of letters. 24 G. 3. c. 37. s. 9. and 42 G. 3. c. 63. s. 14.)

Breaking into any house or shop, by day or by night, or entering by force into any house or shop with intent to cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom or any wary or shute tools, tackle or utensils, or wilfully or maliciously cutting or destroying any velvet, &c., shute tools, &c., prepared or employed in or for the making thereof, or wilfully, &c., breaking, &c., any tools, &c., used in or for the weaving or making any such velvet, &c., or other silk goods, &c., not having the consent of the owner; without benefit of clergy. 6 G. 3. c. 3. s. 15.

Lopping, topping, cutting down, breaking, throwing down, barking, burning, or otherwise spoiling or destroying, or carrying away, in the night-time, any oak, beach, ash, elm, fir, chesnut, or asp, timber, tree, or other trees standing for timber, or likely to become timber, without the consent of the owner first had; or in the night-time plucking up, digging up, breaking, spoiling or destroying, or carrying away, any root, shrub, or plant, roots, shrubs, or plants, of the value of five shillings, and which shall be growing, standing, or being, in the garden ground, nursery ground, or other inclosed ground; transportation for seven years. Accessories made

principals. 6 G. 3. c. 36. and 48. and 13 G. 3. c. 33.

A felon refusing to put himself upon his trial, and to plead, was formerly condemned to undergo the penance of *peine fort and dure*, and be pressed to death; but if he stand mute by the act of God, it shall be inquired of, &c.

In high treason, standing mute is equivalent to a conviction; and judgment, corruption, &c., follow. And so in cases of felony and piracy, by stat. 12 G. 3. c. 20. he shall be convicted of the same, and judgment and execution be thereupon awarded, as if he had been convicted by verdict or confession of the crime.

Of Accessories to Felony.

An *Accessory* is where a person is guilty of some felonious offence, but not principally concerned, though he is a partaker in the crime.

An accessory before the fact, is he that advises, commands, or procures another to command felony, and is absent when done; if he be present, he is a principal.

And an accessory before the fact may be tried either in the county, where the principal felon is tried, or where the offence of being an accessory was committed. 43 G. 3. c. 113. s. 5.

The accessory after the fact, is one who

receives, assists, or comforts, a man whom he knows to have committed felony or murder. *Hale's P. C.* 218.

But the felony must be complete at the time of the assistance given.

If one commands another to beat a person, and he beats him so that he dies, the person commanding shall be accessory to the murder: and in case A commands B to kill C with a gun, who kills him with a sword, A is accessory; because the killing was the substance.

But here, in this case, if B by mistake kill D, it is murder in B, but A is not accessory thereto.

And where a person commands another that he steal a black horse, and he steals a white one, &c., or if the command be revoked, the commander shall not be accessory.

One that is present and aiding to the stabbing of another, is but an accessory within the act 1 *Jac.* c. 8.

1. And there cannot be an accessory before the fact in manslaughter, by reason it is done of a sudden, and not premeditated.

A woman that receives or assists her husband is not accessory; but a husband receiving his wife, makes him an accessory to her offence: a brother receiving his brother may be accessory; so a servant relieving his master, &c.

The furnishing others with weapons; finding a felon a horse for his journey, or relieving him with money, or victuals, knowing him to be a felon, will make persons accessory.

If the owner of things stolen, after complaint to a justice, take his goods, and consent to the escape of the felon, or compound the offence, it is said he may be accessory after the fact.

Though it is otherwise if done before such complaint made.

Accessaries before the fact in petit treason, murder, robbery on the highway, burglary, &c., shall not have their clergy. 4 and 5 P. and M. c. 4.

Receiving an accessory to a felony, makes one accessory of an accessory. *Hale's Sum.* 219.

6. The crime of *Robbery on the Highway*, is a felonious and forcible *taking* away of money or goods from the person of another, on the highway, there putting him in fear.

It is felony without benefit of clergy, though the sum or value taken be under twelve-pence, or but a single penny; but by the common law something must be taken.

And if any thing is taken from another's person, without putting in fear, which distinguishes this crime, it is properly no robbery, but felony, wherein clergy is allowed. 3 *Inst.* c. 16.

There is both a taking in deed, being the very act, and in law; as where a robber compels a man for fear of death, to swear he will bring him a sum of money which he delivers to the other; this is a taking and robbery.

If a robber bids a person on the highway

deliver his money, though it be either with or without weapon drawn, and the person gives it him, it is a felonious taking to make this crime.

And where one with a pistol in his hand, demands money of another, if afterwards he prays alms, and the same be given accordingly, it is a robbery; being accompanied with circumstances of terror, that cause the person to part with his money. *Hawk. P. C.* 96.

A man pursued by a highwayman, endeavours to make his escape, but lets fall his purse, &c., which the robber takes up, this is taking from his person.

So now by statutes 5 *Ann.* c. 31. and 4 *Geo.* 1. c. 11. where the principal felony admits of accessaries, all receivers of stolen goods are accessaries, and may be transported for fourteen years; and in the case of receiving linen stolen from bleaching grounds are declared felons, without clergy. 18 *Geo.* c. 27.

It is the same, though in striving he lets the bag or purse fall again, and leaves it there; or if finding little therein, he delivers it with all the money again to the party: because the offender had the thing in his possession, and continuance is not required. *Hale's Sum.* 72.

To take goods from a servant, in sight of his master, is adjudged a robbery of the master; and taking away a person's horse standing by him, or of any thing belonging to him,

in his presence, and against his will, is robbery.

For the taking a thing in the presence, is in law a taking from the person.

But if one leaves his horse tied to a gate, and steps aside; or if a carrier follows his horses at a distance, and they are taken away, this is not such a taking to be robbery.

All that come in company to rob, being in the same highway, are principals, although one only actually do it; and though he rides away from the rest of the gang, and commits the robbery without their knowledge.

Every one shall be esteemed to take the money, because they came together with an intent to rob some person, and to assist each other.

There is a reward, given by statute, of 40*l.* for apprehending and prosecuting a robber on the highway, so as the party convict him, to be received of the sheriff of the county, on producing a certificate of the judge of his conviction; with the offender's horse, furniture, &c.

Also if an offender out of prison, having committed a robbery, will discover two or more of his accomplices, he shall be intitled to a pardon. 4 and 5 *W. and M. c. 8.*

By statutes 5 *G. 3. c. 25.* and 7 *G. 3. c. 50.* robbing the mail of any bag, &c., of letters, is made felony, without benefit of clergy.

The *Hundred* wherein robberies are committed, are liable to answer the money, when

done on the highway, and in the day-time of any day, except Sunday, in case the robbers are not taken in forty days.

But notice is to be immediately given of a robbery to some of the inhabitants near the place, that the constables may make hue and cry and pursuit with horsemen and footmen after the robber. 27 Eliz.

This pursuit is to be made from parish to parish, until the offender is apprehended, or at least thus pursued to the sea-side; and the constables and others may search all suspected houses and places, and arrest persons as they find suspicious, and carry them before a justice, &c.

If any of the robbers are apprehended within the forty days limited, the hundred is discharged; if not, the person robbed is to make oath before some justice of peace of the county of the time and place of the robbery, and of what he was robbed, and that he knew none of the robbers.

After this, in twenty days, he may bring his writ or action against the hundred, but the process is to be served on the high constable, who shall appear thereto, and defend the action.

Notice must be inserted in the Gazette, describing the robber, and circumstances of the robbery.

And in case a receiver general of taxes be robbed, there must be three in company to make oath of such robbery, to maintain an action against the hundred. 8 G. 2. c. 16.

22 G. 2. c. 24. *Stra.* 406. *Com. Rep.* 345.
Stra. 1170, 1247.

7. The crime of *Burglary*, is where a person in the night-time, (a) breaks and enters into the mansion-house of another, to the intent to commit felony within the same.

To constitute a breaking, the entrance must be obtained either by fraud, conspiracy, threats, or force; there must be an actual entry either of the person of the thief, or some instrument by which the felony is to be committed; and the entry must be with a felonious intent. And it is burglary whether the felonious intention be executed or not (b).

The like offence committed by day, is called *House-breaking*, to distinguish it from burglary.

Burglary may be committed in a mansion-house, though all persons are out upon occa-

(a) The hour must be specified therefore; and the rule is now said to be, that the fact must appear to have been committed between the twilight of the evening and that of the morning.

(b) One of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt) with *design* to commit a rape: and King, C. J. C. P. ruled it to be burglary, and defendant was convicted and transported. *Str.* 481. See *Kel.* 30, 67. *Hut.* 20, 33. *Hale's P. C.* 83. *Hale's P. C.* 562.

sion : so if a man hath two houses, and lives sometimes in one, and sometimes in the other ; but if the house he does not inhabit is broken by any person in the night, it is burglary.

A shop and out-buildings adjoining, are parcel of a house ; and chambers in an inn of court ; or where part of the house is divided from the rest, with a door to the street, either of these are mansion ; and it is burglary to break them. *Hale's P. C.* 82, 83.

In some cases there may be burglary without actual breaking a house ; as where thieves pretend business to get in by night, and the owner of the house opens his door, and then they come in and rob the house, this will be burglary in the offenders.

If a criminal doth not break the house, but is within and steals goods, and after opens the house on the inside, and goes out with the goods ; or if one comes down a chimney to rob the house, &c., it will be burglary.

Where a person unlocks any door, or gets into any house by the help of a key, or breaks the glass of windows, or makes a hole in the wall, &c., in order to steal, it is a breaking of the house.

And setting a foot over the threshold, putting a hand, hook, or pistol, within the window, or door, is an entry in law to make it burglary (a).

(a) But a distinction has been made be

But if a door be open, or hole made in the wall before, and the thief enters and steals, or draws out goods, this is not burglary by the common law.

In case a servant draws the latch of his master's chamber, in the night, to rob him, it is a breaking; and if he opens the window to let in a thief, who comes in and takes things, it is burglary in the stranger, and robbery in both. *Hale's P. C.* 553. 2 *Str.* 881.

Robbery in a booth or tent, in a fair or market, the owner being within the same, is punished as burglary, by statute 5 and 6 *Ed.* 6. c. 9. but see 1 *Hawk.* c. 38. s. 17.

And taking away goods from a dwelling-house, &c., of five shillings value, although there be not any breaking, in either night or the day, is burglary and felony, excluded the benefit of clergy. 3 and 4 *W. and M.* c. 9. perpetuated by 6 and 7 *W.* 3. c. 14. See *Barrington's Observ. on Stat.* 289.

Also the reward of 40*l.* is given for apprehending a burglar, and prosecuting him to conviction, &c. 5 *Ann.* c. 31.

8. The crime of *Rape*; which is where a man hath an unlawful and carnal knowledge of a woman, by force and against her will;

tween cases where the instrument which entered, was for the purpose of breaking only, and not of taking the property. 2 *East. P. C.* c. 15. s. 7.

which offence is felony without benefit of clergy, both by the common and statute law.

It is ordained by the 18 *Eliz.* c. 7. that whosoever shall carnally know any woman child that is under ten years of age, he shall suffer as a felon: and here it doth not signify whether such child consented, or were forced; but it must be proved the offender entered her body, &c.

There is to be an actual *penetration* and *emission* to make this crime; and if there be neither of these, an attempt to ravish, be it never so outrageous, is deemed only an assault.

In case of a rape committed, it is no excuse or mitigation of the ravisher's offence, that the woman at last yielded to the violence, and consented, either after the act or before, if such her consent was forced by fear of death or imprisonment.

Or that a woman was a common strumpet, who is nevertheless under the protection of the law, and may be injured in her body.

But it is said by some authors to be evidence of a woman's consent, that she was a common whore.

And it is a strong presumption against any woman, that she made no complaint in a reasonable time after the injury; for which our ancient laws mention forty days.

If she conceals the fact for any long time, it may argue a consent. *Hawk. P. C.* 108.

A woman ravished may prosecute, and is allowed to be a witness in her own case: but

the woman's positive oath of a rape, without concurring circumstances of the fact, and signs of injury received, is seldom credited.

Because, says *Hale*, there are divers instances of rapes that have been fully proved, but were afterwards discovered to be malicious contrivances. *Hale's P. C.* 635, 636.

If a man can prove an *alibi* as that he was at another place, or in another company, at the time she charges him with the offence, this will invalidate her oath; so it is if she be wrong in the description of the place where done.

Or when she swears the fact to be committed where it was impossible he could have access at that time; as if the room was locked up, and the key in the keeping of another person, &c. 12 *Vin. Abr.* 247.

The aiders and abettors in committing a rape, are deemed as principals.

In Lord Audley's case, he was indicted and executed for assisting a servant in ravishing his own wife. And she at the trial was admitted as a witness against him.

Anciently rape was punished by the loss of eyes and privy members, the offending parts.

9. The crime of *Buggery* or *Sodomy*, is a carnal copulation against nature; as of a man with a man, or man or woman with a brute beast.

And as in rape, so in buggery *debet esse penetratio*, as well as *emissio*: but any the

least degree of it is sufficient. *Hale's Sum.* 117.

'Tis said, that formerly this vile and horrible offence was punished with burning or burying alive: it is now felony by statute excluded clergy, in the agent and all that are present aiding or abetting.

Also in the patient consenting, if he be within the age of discretion.

Persons that attempt to commit this crime undergo a severe punishment of the pillory, &c.

Fortescue is of opinion, that this crime committed by a man on a woman is felony. *Fortes. Rep.* 91.

See more of crimes and offences under *Felony*.

III. *Of Maxims and General Rules.*

A *Maxim* in law is said to be a proposition, by all men to be confessed and granted, without any proof, argument, or discourse. *Contra negantem principia non est disputandum.*

Maxims are some of the grounds of the law of England, and are of the same weight in law as the statutes, and the general customs of the realm are their strength and warrant.

What is a maxim in law, and what is not, shall be determined by the judges, and not by a jury.

or appurtenant be recovered in an assise of novel disseisin, it is a tacit recovery of the common also. *Co. Lit.* 154.

So also where the tenant in tail of a manor to which an advowson is appendant, makes a feoffment of the manor with the appurtenances, and the feoffee re-infeoffs the tenant in tail, saving to himself the advowson on the death of the tenant in tail, his issue being remitted to the manor, is consequently remitted to the advowson also, notwithstanding its severance; for the manor is the principal to which the advowson is accessory. *Co. Lit.* 349. b.

Thus also, in criminal matters, if a servant instigate a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present aiding and assisting, he would have been guilty as principal in petty treason, and the stranger of murder; for it is a maxim that, *accessorius sequitur naturam sui principalis*; and therefore the accessory cannot be guilty of a higher crime than the principal. 3 *Inst.* 139. 2 *Hawk. P. C.* 443. *Dyer*, 128. 254. 4 *Bl. Com.* 36. See also *Wingate's Maxims*.

6. *Accusare nemo se debet nisi coram Deo*: no man ought to accuse himself unless it be before God.

An oath is not lawful whereby any person may be compelled to confess, or accuse himself, &c. Likewise a person may not swear for himself, but only where he has particular power by some statute. 4 *Co.* 9.

The law will not enforce any one to shew or say what is against him ; for which reason an offender, though ever so culpable, may plead Not Guilty.

7. *Aliquis non debet esse judex in propria causa* ; no person ought to be a judge in his own cause.

And therefore a lord of a manor having cognizance of all kinds of pleas, cannot hold plea to what himself is a party ; nor may justices of peace act in any matter relating to themselves ; except in certain parish business, 16 Geo. 2. c. 18.

But an innkeeper in his own case, may detain a guest's horse until satisfaction be made for standing, and other charges : and a person may retake his own goods of which he is dispossessed, or a person having a lien may detain goods until his demand is satisfied, &c.

One cannot generally be witness in his own case ; for it is presumed by the law that he will be partial in speaking for his advantage. *Co. Lit. 6.*

8. *Ambiguum pactum contra venditorem interpretandum est* : an ambiguous deed or contract is to be expounded against the seller or grantor.

So that if a man having a warren in his lands, grants the same land for life, without mentioning the warren, yet the grantee shall have it with the land.

For otherwise the grantor should have excepted such warren out of the deed or grant.

But words shall be taken in the most favourable sense of the speaker; as in an action against a man for saying of the plaintiff that he hath forsworn himself, it may be construed to be in common conversation.

And the action is only maintainable where it is said he hath forsworn himself in a court of record. 4 Co. 13.

9. *A verbis legis non est recedendum*; we ought not to go from the words of the law.

The judges may not make any interpretation of a statute, against the express words thereof; for nothing can so well declare the intent of the makers of an act of parliament, as their direct words in it themselves. 5 Co. 118.

All acts of parliament and letters patent must be construed one part with another, and all the parts of them together; and the words are to be taken in a lawful and rightful sense, and applied to the advancement of the remedy, &c. Co. Lit. 381.

But cases out of the letter of a statute, yet being within the same mischief, shall be within the remedy the statute provides.

10. *Bastardus nullius est filius; aut filius populi*: a bastard is the son of none, or the son of the people.

As a bastard is born out of marriage, his father is not known by the law; therefore he shall not inherit or be heir to any person, and for that he is in law as no man's issue; and he can have no heir but of his own body;

because of the uncertainty who is related to him. *Co. Lit.* 243.

The bastard of a woman is said to be no child, where the mother gives lands to him as such; but having by time gained a name of reputation, he may take a remainder, as a reputed son; and may himself purchase by his reputed name, &c. *Dyer*, 374.

In case a child is born only a day after marriage, between parties full age, it is no bastard, but supposed to be the husband's: so if a man takes a wife, big with child by another, who was not her husband. *Roſ. Abr.* 358.

And if the husband be within the four seas, that by intendment of law he may converse with his wife, and she hath issue, the child cannot be proved a bastard.

These cases are, unless there be an apparent impossibility, that the husband should be the father of it; as if he has lost his genitals, &c. *Co. Lit.* 244.

11. *Caveat actor*: let the actor take care what he does.

If a landlord gives an acquittance to his tenant for the last rent due, all rent in arrear is presumed to be satisfied.

And in case a person bound by bond pays a lesser sum before the day appointed, or at another place than is limited, and the obligee or lender of the money then and there receiveth it, this is a good satisfaction. *Co. Lit.* 212.

Acceptance of rent affirms, and makes a voidable lease to have continuance; and if where a tenant or lessee assigns over his term, the landlord accepts the rent of the assignee, knowing of the assignment, he cannot afterwards sue the lessee for rent. 3 Co. 23, 64.

An executor paying debts on simple contract, before those of a higher nature on judgments, &c. is liable to the payment of all. *Pl. Com.* 543.

And taking any of the goods of the deceased, makes a man executor in his own wrong, and answerable.

12. *Causa & origo est materia negotii*, the cause and beginning is the matter of the business.

Although the law gives power to a person to enter a tavern; the lord to distrain his tenants beasts; him in reversion to view if waste be done, a commoner to enter into the land to see his cattle, &c.

Yet if he that enters the tavern commits a trespass, or the lord that distrains for rent, &c. kills the distress, or if he who enters to view waste breaks the house, or the commissioner cut down trees; in these and the like cases, the law will judge that they enter for that purpose, and they shall be trespassers from the beginning. 8 Co. 146.

13. *Cessante causa, cessat effectus*: the cause ceasing, the effect also ceaseth.

Where a woman married is divorced from her husband, she shall have her goods given

in marriage, not being spent; for they were given in advancement of the woman, and the cause and consideration of that gift is defeated. *Dyer*, 13, 61.

In an action where a debt is the cause of execution, on lands or goods, if the plaintiff releases to the defendant all debts, the discharge of the debt discharges the execution which is the effect of that cause.

If an office be granted to a person, to perform certain business, and he fails in his duty, the office shall cease and determine.

14. *Conjunctio maris fœminæ est de jure naturæ*: the conjunction of male and female is of the law of nature.

The bodies and minds of persons are both joined in matrimony; in contracting which, the consent of the mind is chiefly regarded: wherefore it is said, that the parties' consent, and not the copulation, makes the marriage. *Co. Lit.* 33.

All persons may lawfully marry, that are not near of kin, and prohibited by the Levitical degrees; and age of consenting thereto is fourteen years in the man, and twelve in the woman: if they marry before those ages they may disagree to it.

A husband and wife are accounted in law but as one person: and by marriage the man is intitled to all his wife's real and personal estate; as the husband is the woman's head, all she hath is her husband's; but then he is liable to the payment of her debts.

An action of debt lies against the husband

for goods sold to the wife ; the law presumes they come to his use : but a wife may not make any contract, without the husband's consent, except it be for necessary things for her family, &c. if she do otherwise it will not be binding to him.

The wife is *sub potestate viri*, and therefore her acts shall not bind herself, unless she levy a fine of lands, &c.

15. *Consuetudo manerii & loci est observanda* : the custom of the manor and place is to be observed.

It is the customs of manors must direct what a copyholder ought to do, or ought not to do ; but copyhold estates shall not have the collateral qualities that estates of the common law have, without a special custom. *Co. Lit.* 63.

According to the general custom, if a copyholder commit waste, either permissive or voluntary ; or do not pay his rent to the lord, being demanded, on the land ; or if he refuse to do suit of court ;

Or in case he makes a lease of his estate, for longer time than a year, without licence from the lord, &c. either of these will be forfeitures of copyhold estates.

16. *Consensus tollit errorem*. Therefore in a writ of right, if the jury who are to try the mere right are once impannelled by the four nights, with the consent of both parties, none of the twelve so chosen can be afterwards challenged. *Co. Lit.* 37. a. 294. 5 *Co.* 40. b.

So if an issue be tried by another jury than it ought to be, the verdict cannot be set aside as for a mis-trial, if the venue was changed by the consent of the parties. *Cro. Eliz.* 664. *Co. Lit.* 126. a. *Mr. Hargrave's* edit. note (1) 5. *Co.* 36. b.

17. *Cujus est solum ejus est usque ad celum.* Land, in its legal signification, is of an infinite extent upwards as well as downwards; and this is the maxim of law upwards; and therefore no man may erect a building to overhang another's ground; and downwards, whatever is in a direct line between the surface of the land and the centre of the earth belongs to the owner of the surface, as is every day's experience in the mining countries. 2 *Bl. Com.* 18. 1 *Term Rep.* 704. *Cro. Eliz.* 118. 9. *Co.* 54. *Co. Lit.* 166. *Wood's Inst.* 254.

18. *Cuicunque aliquis quid concedit, concedere videtur & id sine quo res ipsa esse non potest*: to whomsoever any one shall grant any thing, he grants that without which it cannot be.

If lands are granted to a man, he has an implied covenant for peaceable enjoying the same, and the law allows him a way thereto, without being expressly mentioned. *Co Lit.* 56.

And where a person grants all the timber trees growing in his woods, the grantee may come upon the ground, and cut them down, and carry them through all his land though the grass receive injury by the carriage; for

trees are proper to be carried by carts, and when a man hath a title to the principal thing he shall always justify the necessary circumstance. *Pl. Com.* 15.

A tenant at will sowing corn on the ground, if he be ousted by the lessor, shall have free entry, egress and regress), for cutting and carrying away the same.

And in case he be disturbed therein, he may bring an action and recover damages.

19. *Cui licet quod majus, non debet quod minus est non licere*; to whom it is lawful to do the greater, to him it is not unlawful to do the lesser thing.

Where there is a custom that lands may be granted to any one in fee simple; here the grant to a person and the heirs of his body, or for life, is within that custom.

A person who has an office to him and his heirs, may make an assignee, and consequently a deputy.

20. *Dilationes in lege sunt odiosæ*; delays are odious in the law.

The delaying of justice is an obstruction to and a kind of denial of it; and pleas that are dilatory shall not be received, unless sufficient probable matter is shewn for it, or the truth of them be proved by affidavit.

If a plaintiff forbears to bring his cause to trial, the defendant is not to be delayed, but may take out a writ of *venire facias*, directed to the jury to try the cause; by what is termed *proviso*.

If the plaintiff do not proceed to trial in

convenient time, he shall be nonsuit. 14 G.
2. c. 17.

In criminal cases, where persons are committed to prison for capital offences, as treason, felony, &c. expressed in the warrant, on prayer in open court, the first week of the term, or day of sessions, they are to be brought to trial.

If they are not indicted the next term or sessions, upon motion made the last day of such term, &c. they shall be admitted to bail, unless the king's witnesses are not ready.

And in case they are not tried the second term, &c. they may be discharged. 31 Car.
2. c. 2.

21. *Dormit aliquando jus, moritur nunquam*: a right sometimes sleeps, but never dies.

In the eye of our law, right is of such an high estimation, that the law preserves it from death and destruction; for though trodden down it may be, it is never trod out.
Co. Lit. 279.

A right to land, it is held, cannot die; indeed a release of a person's right enures by way of extinguishment, but then it is so understood in respect of him that makes the release, &c.

22. *De minimus non curat lex*. Therefore, where an action of waste is given, if the waste done be only of the value of two-pence, the plaintiff shall not have judgment, *Plowd.*

29. And it is said, that the waste ought to

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be to the value of forty-pence at least. *Herrgrave's Co. Lit.* note (10) p. 54. a.

23. *Dominium a possessione capisse dicitur*: right and dominion is said to have its beginning from possession.

According to this maxim, a long and quiet possession establishes a right; but then it must exceed the memory of man; and if there be proof of record, or in writing to the contrary, though it exceeds the knowledge or memory of any one living, yet it is judged within memory. *Co. Lit.* 115.

The reason why a peaceable possession, without contradiction, makes a right in law, is that thereby there may be certainty of titles to estates.

In a writ of right the limitation of time is made sixty years, by 32 H. 8. c. 1.

24. *Expedit reipublic ut sit finis litium*. Therefore, where a suitor is barred in any action, real or personal, by judgment upon demurrer, confession, or verdict, he is barred as to that or the like action of the same nature for the same thing for ever. *Ferrer's Case*, 6. Co. 7.

25. *Expressum facit cessare tacitum*: a matter expressed causes that to cease, which by intendment of law was implied and not expressed.

A man makes a lease, rendering rent, and the words of reservation are express to the lessor only, the heir shall not have it; but if no person be said to whom the rent shall be

paid, this by implication shall be to the lessor and his heirs. *Dyer*, 45.

An express covenant qualifies the generality of a covenant in law, and restrains it by the assent of the parties, so that it shall extend no farther than it is expressed in the covenant.

But a warranty in law is not destroyed by an express warranty; as if one grants a lease, reserving a certain rent, in which he binds himself and his heirs to warranty of the land, &c.

There the warranty expressed shall not make that in law cease, or be of no effect, but the lessee may choose which he pleases. 4 Co. 81.

26. *Ex nudo pacto non oritur actio*. A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay any thing on one side, without any compensation on the other, is totally void in law; and a man, however he may be bound in honour or conscience, cannot be compelled by law to perform it. *Dr.* and *St. D.* 2. c. 24. 2 *Bl. Com.* 445. *Salk.* 129. 3 *Burr.* 1670.

As if one man promises to give another 100*l.*; here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. 2 *Bl. Com.* 445.

And it is a general rule, that wherever a person promises, without a benefit aris-

ing to the promisor, or a loss to the promisee, it is void. 2 *Bulst.* 269. 1 *Bac. Abr.* 170, as being without a legal consideration. But as all promises shall be taken most strong against the promisor, the law will endeavour to find a good consideration, if possible, in order to support a fair contract. *Poph.* 148. 2 *Roll. Rep.* 104. and therefore any degree of reciprocity will prevent the *pact* from being *nude*; nay, even if the thing be founded on a prior moral obligation, it is no longer *nudum pactum*; as a promise to pay a just debt, though barred by the statute of limitations. 2 *Bl. Com.* 445.; or, a promise by a bankrupt after the bankruptcy, to pay a debt due before, in consideration of the creditor agreeing to take no dividend, *Trueman v. Fenton. Cowp.* 548.; and as this maxim was principally established to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could be assigned, *Plowd.* 308. 3 *Burr.* 1671. it does not apply where the promise is authentically proved by written documents. Sed vide Lord *Mansfield's Opinion*, 3 *Burr.* 1671.; and, therefore, if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of consideration in order to evade the payment; for every bond, from the solemnity of the instrument, *Hardr.* 200. 1 *Ch. Rep.* 157. and every note, from the subscription of the drawer, *Ld. Raym.* 760. carries with it internal evidence of a

good consideration: and courts of justice will therefore support them both as against the contractor himself; but not to the prejudice of creditors or strangers to the contract. 2 Bl. Com. 446. *Noy's Max.* 24. 8 Co. 80.

27. *Expressio unius est exclusio alterius.* Therefore, says Littleton, if the condition upon a mortgage be, to pay to the mortgagee, or his heirs, the money, and before the day of payment the mortgagee dies, the feoffor cannot pay the money to *the executors*, for the payment ought to be to *the heir*; and the law, adds Lord Coke, shall never seek out a person, when the parties themselves have appointed one; for, *expressum facit cessare tacitum.* Co. Lit. 210.

So, also, where a man was bound to pay 20*l.* to such a person as the obligee should by his will appoint, and the obligee named a person executor, but made no other appointment, it was resolved, that the executor should not have the twenty pounds. Lord Nottingham's MSS. notes to Co. Lit. 210. a. Sed vide 1 Freem. 476. 2 Co. 46. 1 Bl. Com. 88.

So, also, where a statute treating of "deans, prebendaries, parsons, vicars," and others having spiritual promotion; *deans* being the highest persons named, *bishops*, who are of still a higher order, are not included under the general words.

28. *Fortior & potentior est dispositio legis quam hominis*; the disposition of the law, is

of greater force than the disposition of man : this is explained in surrenders of estates.

As if a person having granted a lease of lands for years, to begin at Lady Day next, he cannot make a surrender of his future interest, because there is no reversion wherein it may be drowned.

Though in case the lessee before Lady Day take a new lease of the same lands, &c. for years, either to begin presently or at Lady Day, this is a *surrender in law* of the former lease and interest. 10 Co. 67.

29. *Furiosus solo furore punitur* ; a madman of lunatic is punished by his madness.

If a madman kill another, he hath not broken the law, although he hath broken words of it ; because he had not any memory or understanding, but mere ignorance which comes from the hand of God. *Plowden, Com.* 19.

And therefore such madman has favour shewn him by reason of his disability ; he shall not suffer for any felonious act ; nor can the punishment of a lunatic without his mind and discretion, be an example to others. *Co. Lit.* 247.

A madman, in a civil case, cannot promise or contract for any thing, or do any business ; and this is because he understands not what he does : all his acts may be avoided, either by the king, who has the care of the estates of lunatics, or by his heirs.

But if a man *non compos mentis* levy a fine, or suffer a recovery of lands, &c. these

being matters of record, shall bind himself and his heirs, 4 Co. 124.

30. *Hæres legitimus est quem nuptiæ demonstrant*; he is lawful heir whom marriage demonstrates so to be.

A child born within marriage, though ever so soon after, is in law legitimate, and heir to the husband: but an alien may not be heir, though born in lawful wedlock.

In case a child be born in second marriage, within nine months after the first husband's death, he may be heir either to the first or second husband. *Bract. 91.*

A bastard is excluded from being heir; and a monster without human shape, cannot be heir to a person; but an hermaphrodite, if there be any such, may take lands, &c. as heir according to that sex which is most prevalent. *Co. Lit. 8.*

The eldest son, after the death of his father, is his heir: and if there be grandfather, father and son, and the father dies before the grandfather, the grandson shall be heir; who is termed *hæres jure representationis*, because he represents his father's person.

Till the death of the ancestor one is called heir apparent; and by the common law a person cannot be heir to goods and chattels.

There is an *ultimus hæres*, on the escheat of lands, for want of lawful heirs; which is the lord of whom held.

31. *Id certum est, quod certam redditus potest.* Therefore, where a tenant holds his land by shearing all the lord's sheep on a

particular manor, if the service be referred to the number of sheep it would be *uncertain* for there may be sometimes a greater and sometimes a less number, and in such case the tenant would not be distrainable; it being a maxim, that no distress can be taken for a service that is not certain; but if the service be referred to the manor, it then becomes certain.

A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad, for uncertainty. Yet, a custom to pay a year's improved value for a fine on a copyhold estate, is good, though the value of the thing is uncertain; for the value may at any time be ascertained.

32. *Ignorantia juris non excusat*; the ignorance of the law doth not excuse one.

Ignorance of the law, even in infants being of the years of discretion, shall be no excuse, if they commit crimes; and although it be invincible, as where a person affirms that he has done all that in him lies to know the law. *Doct. & Stud. c. 46.*

For every man is bound at his peril to take notice of what the law of the realm is.

If any person takes upon him to know the law, and through ignorance openly affirms that a void lease, &c. is good, to the prejudice of another's title; he may have an action against him, and recover damages.

33. *Ignorantia facti excusat*: ignorance of the fact excuseth.

A person buys a horse in a fair or market of one that hath no property in him; if this were unknown to the buyer, he has good right to the horse, and his ignorance shall excuse him.

But here, if he had known the seller had no right, the buying in open market would not have excused.

Where an illiterate ignorant man seals a deed, and it is read to him false, that makes the same void.

34. *Impotentia excusat legem*; the law excuses impotency.

This maxim regards the infirmities of persons, where the law excuseth their not doing certain acts; as of men in prison, out of the realm, ideots and lunatics, persons blind and dumb, &c. *Co. Rep.* 177.

Legal imprisonment, without any covin, shall be a good excuse for a parson's non-residency, by reason of his impotency.

If a disseisee be an infant, feme covert, or in prison, &c. and the disseisor dies seised of the land, it shall be no descent to take away an entry, because of impotency in such persons.

And their right of action is saved, till their impediments are removed, where others are bound by the statutes of limitation.

35. *Injuria illata in corpus non potest remitti*: injuries to the body cannot be remitted or forgiven.

Our law carefully provides for punishing forcible injuries, between person and person, because they are most contrary to the repose of the kingdom, on which the public happiness depends.

And the life and member of every subject are under the king's protection, to the intent they may serve him and their country when occasion requires. *Co. s. 161.*

So tender is this part of our law, that if one do but menace another with a weapon or staff, or in case he stretch forth his arm, or give any other token, whereby his intention of striking appears; it is actionable as an assault, though no stroke be given.

36. *In omnibus quidem, maxime tamen in jure æquitas est:* in all things, but especially in the law, there is equity.

The laws themselves desire to be ruled by equity; which is said to be a correction of the law, wherein it is any way wanting by reason of the generality of it.

The statute of Gloucester gives an action of waste against tenants for life or years; and by the equity of it, this action lies against him that holds land for one year only, or twenty weeks, &c. And if a lessor come upon the ground of the lessee, it shall be intended that he came to see whether waste were done.

For equity turns all to the best, and makes every act lawful, when it is indifferent if it be or not. *Finch, 57.*

If a person does make a feoffment to a

future use, the feoffee shall be seised of the lands, &c. to the use of the feoffor and his heirs in the mean time; and this is by equity.

37. *In omnibus fere minori ætati succurritur*; in all cases, generally, there is favour shewn to persons within age.

No man or woman, before the age of twenty-one years can alien or sell any lands, goods, or chattels, or bind themselves by deed: so careful is the law of their interest unless it be for necessities. *Co. Lit.* 171.

An infant is permitted to do any thing for his own advantage, but not to his prejudice; he may make a purchase, which is intended for his benefit, though at his full age he may either agree to or wave it.

Infants may buy things, but cannot borrow money even to buy clothes; for the law will not trust them with money, but at the peril of the lender, who must see the same thus laid out. *Salk.* 386. pl. 2.

A presentation to a benefice is to be made by an infant within the six months, being a thing of necessity, otherwise lapse shall incur against him; and he must perform a condition annexed to an estate by his ancestor, or shall be barred of the right to the lands.

In some cases also an infant is impleadable at law, and for his contempt shall receive the same punishment as a man of full age. *Dp.* 104.

38. *In pari delicto potior est conditio defendentis*: therefore, where an assurance was

made on goods on board a vessel "at and from London to New York," subsequent to the passing of the statute 16 G. 3. c. 5. which prohibited all commerce with the province of New York, and confiscates all ships and their cargoes which shall be found trading, or going to or coming from trading, with the said province, and the ship being taken by an American privateer, the assured brought an action on the policy to recover the loss from the underwriter, but it being a direct contravention of the law, the maxim prevailed.

39. *Jus sanguinis, quod in legitimis successione spectatur, ipso natiuitatis tempore quæsitum est*: the right of blood, which is regarded in lawful successions or inheritances, is found in the very time of nativity.

It is therefore *jus primogenituræ*, or right of elder-brotherhood, which is principally respected, and it is a maxim, that the next of the worthiest blood shall ever inherit; as the male and all descendants from him, before the female; and the female, of the part of the father, before the male or female of the mother's part, &c. *Co. Lit.* 14.

Among the males, the eldest brother, and his posterity, inherit lands in fee-simple before any younger brother.

40. *Lex neminem cogit ad impossibilia*: the law compelleth no man to impossibilities.

If the condition of a bond be possible at the time of making it, and before it can be performed, becomes impossible by the act either of God, or the law, or of the obligee, &c., the obligation is not forfeited.

But where a condition for payment of money is made impossible in respect of time; as if it be to pay the same on the thirtieth of February, and there is no such day, it is due and payable presently. *Co. Lit.* 206.

Where a man is bound by a recognizance or bond, with condition for his appearance the next term in such a court, and before the day the cognisor or obligor dies, the obligation will be saved; because it is impossible the condition should be performed.

So in case a lease be granted for twenty years, upon condition that the lessee dwells upon the lands the whole term, and he lives but ten years, the executors shall enjoy the lands; for the condition is become impossible.

A condition of a bond to go to Rome in a few hours, is void and impossible; but 'tis said the obligation may be good.

41. *Legis constructio non facit injuriam*: the construction of law shall wrong no person.

In case an executor of a will grants all his goods and chattels, the goods which he hath as executor shall not pass, for that would be a wrong to the testator's estate.

And where tenant in tail, or for life, makes a lease generally, it shall be taken for the life of the lessor or grantor, or else it would be wrongful to him in reversion.

Though if a person seized in fee, make any lease for life, without mentioning for whose life, it shall be construed for the life of the lessee.

42. *Lubricum Linguae non facit in pœnam*

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est trahendum : the rashness of the tongue is not easily punished.

This is where words are spoken in a passion ; for, in all cases, words of heat, as to call a man, rogue, villain, knave, &c., will bear no action at law. 4 Co. 15.

But if one reproaches another with some heinous crime ; calls a person, thief ; a merchant, bankrupt ; says of an attorney, he deals corruptly ; or calls any one, a perjured man ; an action of the case lies for damages, because these slanders are of great import, and concern a man's life, estate, and condition.

To call a person, bastard, that is heir to an estate ; or say, a man has the French disease, &c., when he is courting a woman, are held actionable.

43. *Mutata forma prope interimitur substantia rei* : the form being changed, the substance of the thing is destroyed.

In case a person cuts down another's timber trees, and squares them to make beams for a house, he may seize the same, before they are thus used. Though if they are laid in the building, they may not be seized by the owner, for their nature is then altered, and they are become part of the house ; yet the party shall have his action for the damage. *Dod.* 132, 133.

And where a man gets the barley of another, and makes it into malt, it cannot be taken again by the former owner, though its form is not lost : because it is become a thing of another nature and use.

44. *Necessitas non habet legem* : necessity hath no law.

Where a fire happens in the street of a town, any person may justify the pulling down the wall, or house of another, to prevent the spreading thereof; as it is a case of necessity.

And if several persons are in danger of drowning, by the casting away of a ship or boat, one to save his life may thrust another from a plank, or the boat's side, &c., though such other be thereby drowned. *Bac. Max.* 25.

According to our ancient books, if a man steals victuals merely to satisfy his present hunger, it is neither felony nor larceny, being for the necessity of preserving life.

But this having encouraged thefts, it is now adjudged otherwise; and the privilege of necessity shall not prevail against the commonwealth.

The great Lord Coke says, *Necessitas est lex temporis*.

45. *Necessitas inducit privilegium quoad jure privata* : the law charges no man with default, where the act which occasioned it was compulsory and not voluntary; or where there is not a consent or election; and therefore, if it is impossible for a man to do otherwise, or there is so great a perturbation of the judgment and reason as in presumption of law man's nature cannot overcome, such necessity carries a privilege in itself.

Necessity is of three kinds, viz. for the

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preservation of life; from the obligation of obedience; and the act of God.

46. *Nihil magis æquitati consentaneum est, quam ut iisdem modis res dissolvatur quibus constituitur*: nothing is more agreeable to equity, than that every thing should be dissolved by the same means it was first constituted.

Every contract and agreement must be released by a matter of as high a nature as that was; so that a deed in writing, under hand and seal, can only be released by some other writing, signed and sealed, &c. 5 Co. 26.

And, therefore, an obligation or matter in writing, cannot be discharged by an agreement by word.

Where an estate is vested in the king by matter of record, it may not be devested out of him but by the like matter; and an act of parliament shall not be avoided but by parliament.

47. *Nullus commodum capere potest de injuria suâ propria*: no man shall take advantage of his own wrong.

If a man be bound in a bond to appear at a day before justices, on which day the obligee casts him in prison, so as he cannot come; no benefit shall be had of this bond. *Noy. Max. 13.*

In case a lessor and lessee of lands, for years, join in the cutting down of timber, the lessor shall not punish the lessee for such waste; and take advantage of his own wrong by joining therein.

An appeal of an infant may not stay for his

full age, which would be taking advantage of his own wrong.

48. *Nec tempus nec locus occurrit regi*: in pursuance of the principle that the king is not only incapable of doing wrong, but even of thinking wrong, the law determines that in him can be no negligence or laches, and therefore no delay will bar his right. But this maxim is subject to various exceptions, both at common law and by statute. First, there are many cases in which the subject may make title against the king by *prescription*, as to treasure-trove, waifs, estrays, and such other things as may be seized without matter of record. *Co. Lit.* 114.

Secondly, in some cases the king's right necessarily fails for want of exertion in due time, either because the subject of his right determines before he claims it, or, because it is specially limited in point of time, by its creation.

Thirdly, sometimes lapse of time drives the king to a suit. Thus, if the king presents to a benefice already full with an incumbent, the king's presentee shall not be received by the ordinary, till the king has recovered his presentment by due course of law. 13 *Rich. 2.* st. 1. c. 1. *Staund. Præ.* 32. 2 *Inst.* 358. *Co. Lit.* 344. *Cro. Jac.* 385. 2 *Inst.* 188. *Hob.* 152. 347.

Fourthly, there are several statutes which wholly extinguish the king's title, if not exerted within a limited number of years. By 21 *Jac.* 1. c. 2. the king is disabled from

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claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued *sixty years* before the beginning of the then session of parliament, unless within that time there has been a possession under such title. But the efflux of time rendering the provision continually more effectual, the 9 G. 3. c. 16. introduced one of a permanent kind, by limiting the king to *sixty years* before the commencement of the suit or proceeding for recovery of the estate claimed.

The other part of this maxim is founded on the idea which the law entertains of the king's ubiquity; for he is supposed to be present in every place where his presence is necessary.

49. *Nullum iniquum in Jure præsumendum est*: no injury is to be presumed in the law.

All things are taken to be lawfully done, till proof is made to the contrary; and fraud shall never be intended or presumed by the law, unless it be expressly averred.

Where no fraud is found by the jurors in a feoffment, the judges shall not adjudge the same fraudulent; and although jurors have found circumstances to intitle the finding of fraud, it is but evidence, and not any matter upon which the court may judge thereof. 10 Co. Ch. of Oxford's case.

For the office of the jurors is to adjudge upon the evidence concerning matters of fact, and thereupon to give their verdict; and not

leave things to the judgment of the court, which do not appear to them.

50. *Omne actum ab agentis intentione est judicandum*: every act is to be judged from the intention of the agent.

It is held in contracts and obligations, the intention of the parties is the chief thing that the law regards; from such words as shew the assent of parties, and have substance in them, are sufficient.

The law will likewise take one word for another in deeds, to supply the intention of persons; as where a man has a remainder of lands, if he grants it to another, by the name of a reversion, the grant is good, notwithstanding the mis-termining of the thing.

In wills, the intent of the testator shall generally be observed, as far as is consistent with established rules.

51. *Omne majus continet in se minus*: therefore, if a man tender a greater sum of money than he is bound to pay, yet the tender is good; for, *quando plus fit quàm fieri debet videtur etiam illud fieri quod faciendum est: et in majore summa continetur minor*. So also where a man is empowered to make assigns, he hath thereby an implied power to appoint a deputy; for, *cui licet quod majus est non debet quod minus non licere*; as where the office of steward is granted to a man and his heirs, he may make a deputy. Thus, also, a man in prison shall not be bound by a recovery by default for want of answer in a court of record in a real action, which is mat-

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ter of record; and *à multo fortiori* he shall not be bound by a descent *in pais*, which is matter of deed, and consequently of an inferior nature; for the argument, says Lord Coke, *à minore ad majus*, always holds affirmatively, and the argument *à majore ad minus*, negatively; the reason of which is, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori*.

The statute of 1 *Edw.* 6. c. 3. enacts, that those who are attainted for stealing *horses* shall not have their clergy; and therefore, as penal statutes are to be construed strictly and literally, the judges held that it did not extend to a person stealing one horse only, and the legislature was obliged to supply the defect: but, says Lord Bacon, if the statute had taken clergy from those who should steal one horse, no question could have been made but that he who stole more than one would have been within it: *quia omne majus continet in se minus*.

52. *Possessio fratris de feodo simplici facit sororem esse hæredem*: the possession of the brother, of a fee-simple, makes the sister to be heir.

A man has issue, a son and a daughter by one woman or venter, and a son by another, then dies seised of lands in fee-simple, and the eldest son enters into the lands, after which he dies without having any issue. Here the sister shall have the land, and not the younger son or brother, though he be heir to the father; but there must be an actual

entry upon the land, otherwise it goes to the younger brother. *Co. Lit.* 14.

The possession of a brother of an estate-tail, shall not make the sister heir; for it descends to the younger son of the half blood, who ought to have it *per formam doni*. *Pl. Com.* 57.

53. *Prohibetur ne quis faciat in suo, quod nocere possit in alieno; et sic utere tuo ut alienum non lædas*: it is forbidden that any one should do that in his own, which may injure another: and so use your own, that you do not hurt others.

Where a man does any thing upon his own ground, to the particular damage of his neighbour, it is accounted a nuisance; and an action lies for it, or the same may be abated or removed by the persons that are prejudiced thereby.

If a man has a house that has ancient lights, and a stranger having lands adjoining, builds a new house on his lands, so near that the windows of the other are darkened by it; it is actionable.

As is also the setting up or making a house of office, dye-house, lime-pit, &c., so near to another's house, that the smell thereof annoys him, or is infectious; or if the corruption of the water of the pits hurts his water or grass, or destroys fish in a river, &c.

54. *Proximus sum egomet mihi*: every one is next to himself.

In case of wills, where an executor is appointed, he may pay himself a legacy, before

any other; and among debts of equal degree, the executor may pay his own debt first.

Executors are nearer to the testator, and do more represent his person, than the heir does the ancestor; this is held, because if an executor be not named in a mortgage, yet the law appoints him to receive the money.

But the heir shall not receive it, unless he be named. *Co. Lit.* 209.

55. *Publicum bonum privato est preferendum*: the public good is to be preferred before private interest.

A woman intitled to dower shall not be intitled of a castle of defence, for that is *pro bono publico*; but as to castles for private use and habitation, it is otherwise.

The inhabitants of a village may make by-laws for repairing a church or highway, or any such thing as is for the public good generally; and the greater part shall bind all of them, without custom. *5 Co.* 63.

And corporations have power to make ordinances, for the government of their bodies politic, and better execution of the laws of the realm: but they may not do so, without a custom or charter, unless it be for things concerning the public good.

56. *Qualibet concessio fortissimè contra donatorem interpretanda est*: every man's grant shall be taken most strongly against himself.

Whenever a deed is uncertain, and the words of it are ambiguous, it shall be construed most strongly against the grantor

therein; as if a man grants an annuity out of land, and he hath no land at the time of the grant, it shall nevertheless charge his person.

And where any deed made to a person, is good for part, and for some part thereof not good, that which is for the benefit and advantage of the grantee, shall stand good in law. *Co. Lit.* 42.

But although grants are taken strongly against the makers, yet no wrong must be done by it; and a man may not be obliged by his own act and deed to do some things which are against law.

For if a husbandman be bound not to till or sow his land, the obligation is contrary to the common law and void. 11 *Co.* 53.

57. *Qui facit per alium facit per se*; what one does by another, he does by himself.

If a man impowers another by letter of attorney to sell and alien his land, and he doth so, it is an alienation by him; and where a person gives authority to his bailiff to sell cattle, and he doth it, this will be his sale by the bailiff. *Plowden's Com.* 475.

Where any person has a bailiff or servant, who is known to be such, and he sends him to markets to buy goods, his master shall be chargeable with the payment, if the things come to his use.

In case he sells his master's cloth, and warrants it to be good, or of a certain length, when it is not so, an action lies against the master only, and not the servant. *Noy.*

And if a person commands one to do a

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trespass, or to beat another, he shall be himself a trespasser.

58. *Qui sentit onus, sentire debet et commodum*: he who bears the burden, ought also to receive the profit.

A man seized of lands in fee, hath issue a daughter and dies, his wife being with child of a son; the daughter enters and sows the lands, and then the son is born, and his next friend enters, here the daughter shall have the corn growing on the ground. *Perkins.*

Also a tenant for life, or in dower, having sown corn upon the land, may devise the same growing at the time of their deaths; and their devisees shall have it.

59. *Qui sentit commodum, sentire debet et onus*: he that reaps the profit ought to bear the burden.

If a person grant a rent-charge for life out of his land, and afterwards conveys the land to others, in every one of whose time the rent is behind, and then the grantee dies, his executor may bring action of debt against all of them for rent due in their time; as they all have the profit of the land. 4 Co. 49.

And on assignment of a lease, the lessee who hath covenanted to repair, may have an action of covenant against his assignee, for suffering a house to decay; because he that enjoys the profit, must bear the burden and charges.

Where persons enjoy benefit by making banks of a river, they are to contribute to

the repairs thereof. 5 Co. 100. and so of party walls.

60. *Quod initio vitiosum est, tractu temporis non conualescet*: that which in the beginning is vicious, cannot by length of time be made good.

In case a bishop makes a lease of church lands for four lives, which is contrary to the statute, though one dies in his life-time, so as now there are but three, and afterwards the bishop dieth, yet it shall not bind his successor.

For here the lease so made had a bad and unlawful beginning, it being for more lives than the act allows, and therefore cannot be brought to a good end. 10 Co. 62.

If an infant or feme covert, that is, a married woman, makes a will, and publishes the same, and afterwards dies, being of full age or sole, both these wills notwithstanding will be void and of no effect.

And this is because the foundation, viz. the making and publishing are void. *Plowden's Com.* 344.

61. *Quod est inconveniens, et contra rationem, non est permissum in lege*: whatever is inconvenient, and contrary to reason, is not permitted in the law.

It is likewise a maxim, that what is contrary to reason is unlawful: and hence it is said, that all positive laws, which are contrary to the laws of nature and of reason, are no laws at all.

Therefore, if a town hath customs, which

are against law and reason, and those customs are confirmed by act of parliament; such confirmation shall not make them to be good and binding. *Co. Lit.* 110.

But no person ought, out of his own private opinion, to be wiser than the law.

62. *Quod alias bonum, &c., justum est, si per vim, vel fraudem petatur, malum et injustum est*; what otherwise is good and just, if it be acquired by force or fraud, it is evil and unjust.

And if it be mixed therewith, it is the same thing; for where a man by will devised tenements to superstitious uses, and also to good and charitable uses; it was adjudged that the commixture of the evil use with the good, infected the good use and destroyed it. *4 Co.* 113.

At the common law, forcible entry into houses or lands, &c., was no crime where a person had title, and entry was lawful.

But by statute, none shall enter into lands or tenements, but in a peaceable manner, though they have title of entry; upon pain of imprisonment, &c. *15 R. 2. c. 2.*

In this case, justices of peace have authority to commit offenders till they pay a fine, and to restore the possession; or an action of trespass may be brought, and treble costs recovered. *2 Inst.* 257.

63. *Res inter alios acta alteri nocere non debet.* Thus, if a man make a lease for life, and then grant the reversion for life, and the lessee attorns; after which the lessor disseises

the lessee for life, and makes a feoffment in fee, and the lessee re-enters; this shall leave a reversion in the grantee for life, and another reversion in the feoffee; and yet this is no attornment in law of the grantee for life, because he doth no act nor assent to any which might amount to an attornment in law, *et res inter alios acta alteri nocere non debet.*

64. *Rex est vicarius et minister Dei in terra, omnis quidem sub eo, et ipse sub nullo nisi tantum sub Deo.* The king is the minister of God upon earth; every one is under him, and he under none, but only God. *Bracton, c. 8.*

All the lands in England are said to be holden either mediately or immediately of the king; and all estates for want of heirs, or by forfeiture, on committing crimes, escheat to the king, as lord paramount. *Co. Lit. 1.*

Lands in the king's possession are free from tenure; for a tenant is he who holds of some lord by service, and the king cannot be a tenant, because he hath no superior but God: neither may the king be jointenant with any, for none can be equal with him. *8 Co. 118.*

The king's grant is taken strongly against a stranger, and more favourable for the king; contrary to the grants of a common person: and if the king grants land in fee-simple, upon condition that the grantee do not alien or sell the same, it is good; though void in others. *Plowden's Com. 243.*

Where a right or title of the king and the subject concur and meet together, his title

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shall be preferred; and the king's title is not to be tried, without warrant from the king, or assent of his attorney general.

No distress can be made upon the king's possession; but he may distrain out of his fee in other lands, &c., and may take distresses in the highway: the king may also distrain for the whole debt or rents due of one tenant, where the estate is let to several.

In whose hands soever the goods of the king come, their lands are chargeable, and may be seized for the same; and the king is not bound by the sale of his goods in open market.

The debts of the king shall be satisfied, before those of a subject, for which there is a prerogative writ; and until his debts be paid, he may, by writ, protect his debtor from the arrest of others; but although the king's debt is to be first paid, that must be when it is in equal degree with the subject's. *Plowden's Com.* 241.

No prescription of time runs against the king; he is not within the statute of limitation; an entry shall not bar him; nor will any judgment be final against him, but with a *salvo jure regis*.

The king cannot be nonsuit, as he is supposed to be present in all his courts; and he may have such process in his suit, as no other person but himself can have: and an action lies not against the king, but a petition instead of it, to him in the Chancery.

The king is the fountain of honour and

justice: all statutes are to have his royal assent, and in calling or dissolving parliaments, declaring war and peace, &c., his proclamation has the effect of a law.

Also acts of parliament are not binding to the king, unless they concern the commonwealth, or he be specially named.

But notwithstanding the king's prerogative is so large, as we find that to be law almost in every case of the king, that is law in no case of the subject;

Yet the king may not by petition or bill, &c. dispose of any man's lands or goods.

Nor shall he take that he hath a right to, which is in the possession of another, but by due course of law.

He may not command a man to prison, against the writs and processes of law; *nihil potest rex quum quod de jure potest.*

For the law is the rule of the king's prerogative, which does not extend to any thing injurious to others. *Plowden's Com.* 487.

And as the subject owes to the king his true and faithful obedience; so the king is to defend the laws, and protect the bodies and goods of his subjects.

“ Protectio trahit subjectionem, et subjectio protectionem.

65. *Salus populi suprema est lex*; the health and welfare of the people is the highest law.

The main end of government is the com-

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mon good of the subject; and by the same law which ordains our kings, the meanest of the people enjoy the liberty of their persons, and property of their estates, which it is every man's concern to preserve to the utmost.

In cases that are for the general good of the people, a man can justify doing of a wrong; as in time of war, a person may erect bulwarks on another man's lands: and hence it is, one may at any time raze an house that is burning, for the safeguard of neighbouring houses. *Plowden's Com.* 392.

Trade being for the benefit and good of the people, bonds to restrain the exercise of it, are held void; and the instruments of a man's trade or profession may not be distrained; as the books of a scholar, axe of a carpenter, &c.

But this is understood when other things may be taken as a distress. *Co. Lit.* 47.

66. *Semel malus semper præsумitur esse malus*; those who once are evil, are always presumed to be so.

This hath been understood, *in eodem genere mali*, in the same kind of evil; as perjured persons, who have once forsworn themselves, and thereof are convicted, will not be afterwards admitted to give evidence in any cause, because they have once so offended.

And no infamous person, or one attainted of false verdict or conspiracy, or convicted of forgery or felony, or that has stood in the

pillory (a), &c., shall be allowed to be a witness, *Co. Lit.* 6.

But if a man convicted of felony, or who hath stood in the pillory, be afterwards pardoned, it restores him to his credit as a new man, and he may be a good evidence, 2 *Hawk. P. C.* 397. pl. 48.

67. *Substantia prior et dignior est accidente*: the substance is more worthy, and before the accident.

No declaration or court in a suit at law shall abate, so long as the matter of action is fully shewed in substance in the declaration and the writ, as is provided by the statute 36 *Ed.* 3. st. 1. c. 15.

And no judgment shall at any time be arrested or stayed in any court of record, for want of any matter of form in the declaration, plea, &c., or for any defect whatsoever, except only matter of substance, which shall be shewed publicly to the judges of the said courts. 18 *Eliz.* c. 14.

After verdict is given in an action, in the courts at Westminster, the judgment shall not be reversed by writ of error, for any faults either in form or substance, in any bill or writ, &c., or for variance therein from the declaration or other proceedings, by 5 *G.* c. 13.

(a) *i. e.* For an infamous offence, since it is the crime, not the punishment which incurs the infamy.

68. *Ubi major pars est, ibi, est totum* ; where the major part is, there by the law, is the whole.

The only way of determining the acts of many, is by the major part or a majority ; as the major part of members of parliament enact laws, and the majority of electors choose the members of parliament ; and the act of the major part of any corporation, is accounted the act of the corporation.

A dean and the major part of the chapter make the spiritual corporation, and their act is binding though the rest do not agree to it ; for the whole chapter is said to do what the major and sounder part doth.

And the consent of such major part is expressed by fixing their seal ; which consent is the will of many joined together. *Dav. Rep.* 48.

69. *Veritas nihil veretur nisi abscondi* ; truth fears nothing but to be concealed.

And truth is nothing else but an affection of our speech and actions agreeing with the mind ; but is properly called *Veracitas*, that is a speaking of truth : of which it is to be understood, that it is afraid of nothing more than to be obscured. *Plowden's Com.* 59.

Fraud and covin are so mixed with truth, as they often deceive, and put a false gloss upon the worst things ; though the law will never permit them to suppress the truth, where it can be discovered.

And, in all cases, it labours to make a discovery, and censure corruptions.

70. *Vigilantibus non dormientibus leges subveniunt*: the laws help those that are watchful, and not those that are sleepy and negligent.

For want of being watchful, and by negligence, a right may be lost; as where an action is not brought within the time appointed by the statute of limitations. 21 Jac. c. 16.

All actions of debt, upon the case, (except for words,) actions of account, (other than concerning merchandize,) of detinue, trover, and trespass, must be commenced within six years after the cause of action; and all actions of assault and battery, wounding and imprisonment, must be brought within four years; and for slander within two years, after cause of action, and not afterwards. So ejectment within 20 years after the title accrued.

If a fine be levied of another's lands, the person that has a right thereto, ought to make his claim within five years after the proclamation made or certified, or he will be barred thereby. 1 R. 3. c. 7.

By the common law, claim is to be made within a year and a day after a person is disseised of land, or he may not enter; and if a feme sole be disseized before marriage, and then takes an husband, there a descent of the lands during the coverture, takes away her entry. *Lit.* 95. for when the statute begins to run, it never ceases.

But where a married woman is disseised, if a descent be cast during her coverture, it bars

her not of entry till five years after the husband's death.

*General Rules and Maxims concerning
Descent of Lands.*

Descent is a means whereby lands or tenements are derived to any man from his ancestors.

It is a *Maxim* in our law, that land shall descend from the father to the son; and that if a man have two sons by divers *wenters* or wives, and the one purchases lands, and dies without issue, the other shall never be his heir, &c.

The *Descent* at common law, is either *Lineal*, or downwards in a right line, from the grandfather to the father, the father to the son, and the son to the grandson, &c., so that the lineal heirs shall first inherit;

Or it is *Collateral*, that which springs from the side of the whole blood, as another branch of it; such as the grandfather's brother, the father's brother, and so downwards.

In case a man purchase lands in fee, and then dies without any issue, here for default in the right line, he that is next of kin in the collateral line of the whole blood, though never so remote, shall come in by descent as heir to the purchaser.

By our law, inheritances may *descend*, but cannot ascend; and therefore in the right line children inherit to their ancestors without

limitation: but the ancestors may not take from their children, for the father can never come to the lands which his son hath purchased, by lineal ascent.

“Though he may by collateral ascent; as where the son’s land comes to his uncle, and then to the father: in the collateral line, the uncle inherits to the nephew, and the nephew to the uncle.

There is a maxim, that to lands descending on the part of the father, the heirs of the side of the mother shall never inherit: and lands descending on the part of the mother, the heirs of the father shall not inherit.

So that where lands descend to the son from the father, and he enters and dies seised thereof, without having any issue, this land must go to the heirs of the father’s part, who are of the whole blood; and if there are none such, the land shall escheat: the same law is, where lands descend on the mother’s part.

But if one seised of land, as heir on the part of the mother, levies a fine, or makes a feoffment, and takes back an estate to him and his heirs; this as a purchase will alter the descent; and if he dies without issue, the heir of the father shall inherit the land.

If a father having purchased an estate, the same descends to a son, who, after entry thereon, dies without heirs; it is said, the lands shall descend to the heirs of the father, or mother of the father, and not to the heirs of the mother of the son.

For although they are more near of blood to him that was last seised, yet they are not of the blood of the first purchaser: and a man or woman have two immediate bloods in them, *viz.* of the families of their father and mother.

Where a son purchases, and there is no heir on the side of the father; his land shall go to the heirs on the mother's side; here the law makes a difference, where the son purchaseth lands in fee, and when he comes to them by descent.

There is also some difference between descents from a father and mother to their children, and between brothers and sisters; for a son or daughter need be only of the blood of either the father or mother, which hath the inheritance, to be heirs to them.

But the brothers and sisters must be of the same father and mother, to inherit one another.

To have lands in fee-simple by descent, a person must not only be heir of the whole blood, but he is to be the next and most worthy of blood to his ancestor.

And, therefore, where a person has issue two sons, by several *venters*, the younger brother of the half blood shall not have land purchased by the elder brother, on his dying without issue; but the elder brother's uncle, or next cousin shall have it.

A sister that is of the whole blood, shall be preferred to a younger brother who is but of the half blood; though such younger brother

shall be heir to his father or his uncle, but not to a brother, because he hath not the whole blood in him.

If a younger brother purchase land, and die without leaving any issue, the elder brother of the whole blood will be intitled to the land by descent; the eldest is the most worthy of blood to inherit to the brethren, as well as to the father.

And here if there is no brother or sister, the uncle shall have the land as heir, and not the father; and yet it may be afterwards come to the father, as heir to the uncle, as was shewn above.

Likewise, in case the father hath issue another son or daughter, after the descent to the uncle, that issue may enter upon him, and hold the estate.

In the case of a son's purchasing lands, and dying without issue; the sister of the father's grandfather, and so *in infinitum*, shall be preferred in the descent before the father's mother's brother; though he is a male and they are females and more remote.

And this is because the sisters are of the male line, which is more worthy than the female line, and shall ever exclude it, although the female line be also of the blood of the father.

If for default of heirs of a purchaser, of the father's part, or where such an heir had not entered, the lands go or descend to the line of the mother;

There the heirs of the mother of her fa-

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ther's side, shall take and be preferred in the succession, before those of the part of her mother, because they are the most worthy.

All the descendants from a person; as by law might have been heir to another, and have lands by descent, hold the same right by representation, as that common root from whence they are derived.

Hence the son, or grandchild, whether son or daughter of the eldest son, succeeds in descents before the younger son; and the son or grandchild of the elder brother, before the youngest brother.

And so it is through all the degrees of succession, the right of proximity is transferred from the root to the branches, and gives them the same preference in law as the next and worthiest of blood.

Also the great grandchild of the elder brother, whether it be a son or daughter, is to be preferred before his younger brother; for though the female be less worthy than the male, here she stands in right of representation of the elder brother, who was more worthy than the younger.

Of common Descents, and Descent by Custom and Statute.

1. Lands and tenements in fee-simple descend, first to the eldest son as heir, and to his issue; the sons first in order of birth; and

for want of sons, to all the daughters equally, who inherit in coparcenary as one heir.

If the eldest son has no issue or children, then the lands descend to his next eldest brother of the whole blood, and his issue; and for want of a brother, to his sister or sisters of the whole blood, and their issue.

If there be no brother or sister, the estate descends to the uncle and his issue, and for want of an uncle, to the aunt or aunts and their issue.

And if there be no uncles or aunts, then to cousins in the nearest degree of consanguinity.

If an eldest son be an alien born, he has no inheritable blood in him, so that in that case the younger son born without the king's allegiance, shall have land by descent from his father, and not the elder son.

2. Descent by custom is, that sometimes the lands shall descend to all the sons, or to all the brothers, where one brother dies without issue, as in gavelkind in the County of Kent: and until the time of William the First, called the Conqueror, this was said to be the general descent of the lands all over England.

Sometimes lands descend to the youngest son, as by the custom of borough English; and sometimes to the eldest or youngest daughter, according to the particular customs of places.

3. Descent by statute, is a descent in fee-tail, as directed by the manner of the limita-

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tion or settlement, pursuant to the statute *de donis conditionalibus*, Westm. 2. And in descents of estates-tail, the issue are ever of the whole blood to the donee.

So that half-blood is no impediment to any such descent.

Of Descent and Purchase of Lands.

As descent is created by law, and the most ancient title, an heir is in by that, before a grant, or devise to him.

If a man by will devises lands to his heir at law, the devise is void, and he shall take the land by descent; and so it is where the lands will come to the heir, either in a direct or collateral line; or if the heir has an estate by way of limitation, when the word heirs is not a word of purchase.

Wherever an heir takes that land, &c. which his ancestor would have held and taken if living, he shall have it by descent, and not by purchase.

But where an estate is given and devised to the heir, attended with a charge, as to pay money, &c. in that case he generally holds by purchase, and not by descent.

One is in by purchase when he comes to lands by legal conveyance, either for some consideration, or by gift, and not as heir at law; whereas descent from an ancestor cometh of course, by act of law.

And there is this difference between pur-

chase, and descent of lands; if an heir is adjudged to take by purchase in a marriage settlement, a fine, &c. levied of the land, may be no bar; as it might if the heirs took by descent.

If one who is heir takes lands by purchase, the lands are not assets in his hands to pay debts, &c. which if he had come to them by descent, they would be.

Every common *purchaser* of lands, must at his peril take notice of the estates and charges which are upon the land; for the law presumes that no man will purchase lands, without advice of counsel.

Yet there are several statutes, which guard against fraudulent incumbrances; and conveyances of any estate in land made to defraud a purchaser shall be void. 27 *Eliz.* c. 4. perpetuated by 39 *Eliz.* c. 18.

General Rules relating to Tenures and Estates.

The *Fee-Simple* estate, is where a man hath lands or tenements of inheritance, to hold to him and his heirs for ever.

An estate in fee-simple is such as is held without limitation to what heirs, but to heirs generally: it is the word heirs makes the inheritance, and a person cannot have a greater estate.

Where land is granted by deed, to hold to one for ever, or if it be to him and his assigns

for ever, this is no fee simple, but an estate for life only, because the word heirs is wanting.

Yet in case of a will, which is more favoured in law than a grant, the fee-simple and inheritance may pass without this word *heirs*, or other words of perpetuity, where the intention of the testator to convey the whole interest is manifest.

If a gift be made of lands to a person and his children, and their heirs, it is a fee-simple jointly to all that are alive; and if an annuity be granted to one and his heirs, it is a fee-simple *personal*.

At common law, *all estates* of inheritance, it is said, were fee-simple, and all other estates are derived out of it; for which reason there must always be a fee-simple at last in somebody.

Estates in Fee have been generally divided in *fee absolute*, otherwise termed the *fee-simple*, and *fee conditional*, otherwise called *fee-tail*.

And he who is seised of lands in fee-simple, may give, grant, or charge, the same, as he pleases, by deed or will; but so may not he that has an estate-tail.

2. The *Fee-tail* estate, is an estate of inheritance whereof a person is seised to him and the heirs of his body, begotten or to be begotten.

It is a limited estate or fee, opposed to that of fee-simple; and there must be not only the word *heirs*, in the deed which creates it, but

also the word *body*, for it is that makes the estate-tail, without which it may be a fee-simple estate.

Fee-tail, is either a *general tail*, where lands or tenements are given to a man and the heirs of his body begotten; or to a woman and the heirs of her body begotten.

In which case it is called *general tail*, because how many wives soever a person who holds by this title shall have, in lawful marriage, his issue by them severally are all capable of inheriting in their turns.

And if the woman has several husbands, and hath children or issue by every one of them, they may inherit after each other as heirs of her body.

Or it is a *tail special*, when lands are limited to a man and his wife, and the heirs of their two bodies begotten; and it is termed special tail, by reason that no other persons can inherit the lands but the issues that are begotten on that particular wife.

When lands are given to a husband and wife, and to the heirs of the body of the husband, he has an estate in general tail, and the wife an estate only for life.

This is because, the word *heirs* hath relation in general on the husband's body.

And if an estate be limited to a man's heirs that he shall beget on the body of his wife; though it creates a special tail in the husband, the wife in that case will be intitled to nothing.

If a gift be to persons unmarried, or to a

married man and another's wife, and the heirs of their bodies, it may be a good estate in special tail, if they afterwards marry.

There is an estate-tail within the equity of the Stat. of Westm. 2. where lands are granted to a person and his heirs male or female of his body begotten; in which case the male or female issue shall only inherit, pursuant to the limitation.

If here the estate be limited to heirs male of the body, the pedigree must descend by heirs male; and on the other hand, if it be to heirs female, the title must be derived by heirs female one after another.

So that where a grant is made to a person, and the heirs male of his body, and he has issue a daughter, who hath a son, and then dies, such son may not inherit the estate, because he cannot make his descent by heirs male.

A lease for years may not be intailed; if it be made to a man and the heirs of his body, it is void; for a chattel cannot be turned into an inheritance; yet it may be assigned in trust to permit the issue in tail to receive the profits of the land; and that in effect is an estate-tail.

It is incident to the estate of tenant in tail, to be punishable of waste; that such tenant may levy a fine to bar his issues, &c. or suffer a recovery; also he may grant leases for twenty-one years, or three lives, according to the statute 32 H. 8. c. 36. and by custom grants copyhold lands, &c.

He cannot in any other manner grant or convey a greater estate than for his own life; or give away the land by will, &c.

Intails are usually created upon marriage settlements, where the lands are settled on the husband for life, then to the wife for her life, and to their issue in remainder.

And if tenant in tail, general or special, die without issue, so as there is no heir to take according to the limitations, the donor or his heirs may enter as in reversion.

Or the land shall descend to such person as is limited to have it after the estate tail is spent.

3. *The Estate-tail after Possibility of Issue extinct*, is where any lands are given to a husband and wife and the heir of their bodies in special tail, and one of them dies without issue had between them, the survivor shall hold the land as tenant in tail after possibility of having issue.

This is an estate which none can have but the donee or tenant in special tail; for the donee in general tail may possibly have issue at any time.

Where the donees in special tail have issue, if the issue die without issue, so that there is none other left which may inherit by force of the intail; the survivor of the donees will have an estate in tail after possibility of issue extinct.

These tenants in tail, as also tenants by the curtesy, or for life, suffering a recovery without the assent and to the prejudice of him in

remainder, incur a forfeiture of their estates; and such recoveries are void.

But tenant in tail after possibility of issue extinct is not punishable for waste, as is the tenant for life; but the waste, as timber felled by him, does not thereby become his property, but of the first person then living who has an estate of inheritance.

It is observed that by settlements guarding against accidents, and limiting remainders over, this estate now seldom happens.

4. *The Estate held by the Curtesy*, is when a man takes a wife, who is seised of lands and tenements in fee simple, or in fee tail general, or as heiress in special tail, and he hath issue by her male or female, which by any possibility may inherit, and then the wife dies.

Here the husband, after the wife's death, shall hold the lands during his life, by the curtesy of England. 1 *Inst.*

And although the issue by the wife, being born alive, die immediately, the husband shall be tenant by the curtesy; and it matters not whether the child were ever heard to cry: but in case a child is ripped out of the mother's belly, after her death, though it be alive born, it will not give tenancy by the curtesy.

If lands are given in tail to a woman and the heirs male of her body, and she afterwards marries, and has issue a daughter, and dies, the husband shall not hold the estate by the curtesy; for this issue cannot possibly inherit. *Termes de Ley.*

In case lands or tenements descend to the wife, after the husband hath issue by her, he shall be tenant by the curtesy; but not of a reversion or remainder expectant of which she never was seised.

When the lands are gavelkind, the husband holds only a moiety of them, and loses even that by a second marriage.

5. The *Estate in Dower*, is that estate or portion of the husband's lands, which the law allows a widow after his decease.

By the *Common Law*, this dower is where a person is solely seised of lands or tenements in fee-simple, or fee-tail general, or as heir in special tail, and marries a wife and dies; his widow shall have a third part of all lands or tenements as were the husband's, at any time during the coverture, to hold during her life, but not of copyholds, except by the custom of the manor.

This estate the widow shall have, whether she had issue by her husband or not; and it is not necessary that seisin should continue to the death of the husband; for if he sells or aliens the lands, it is still the same.

Dower by Custom, is such part of the husband's estate, to which the widow is entitled after the death of her husband, by the custom of some manor or place, so long as she lives sole and chaste.

And it is frequently more than one third part; for in some places she shall have half the land, and in others the whole during life, which is then called her *free bench*.

At common law, dower is to be assigned by the sheriff, on the king's writ; or by the heir, &c. by agreement among themselves; and anciently a woman was to live and continue a whole year in the house of the husband for the assignment of the dower.

But, by *Statute*, the widow shall immediately on the husband's death have her marriage inheritance, and shall remain in his chief house forty days, called the widow's quarantine, within which time dower is to be assigned her of the third part of the lands and tenements of the husband. *Magna Charta*.

A woman may be endowed of the principal messuage, if it be not a castle; and of things whereof no division can be made, the dower must be assigned in a special manner; as the third presentation to a church, &c.

The wife of one who held lands as tenant in common with another, though not of a joint-tenant, shall have dower; and she shall hold her part in common with the other tenants.

On a tenant in tail's dying without issue, whereby the land reverts to the donor, and the estate-tail is determined, a woman may be endowed thereof.

And a devise of lands by the husband to his wife by will, is held to be no bar of her dower, but a gift of benevolence; and therefore she may enjoy both.

For dower is much favoured in law, being for the benefit of widows; and therefore, though the husband be convicted of felony,

Ac. ~~the~~ **widow** shall have her dower: but not if ~~she~~ be attainted of treason (a); nor the wife of an alien, unless it be the queen consort.

If a wife commits either treason or felony; or in case she elopes from her husband, and lives willingly with the adulterer, she shall forfeit and lose her dower. 13 *Ed.* 1. c. 34.

Yet it is otherwise if the husband be afterwards reconciled to her, and she returns to him again, for then she shall be endowed. 2 *Inst.* 435.

Although a man grants his wife over to another, and she by force of the grant does live with the grantee, during the life of the husband, her dower becomes forfeited.

Such a grant is void, and the wife lived in adultery notwithstanding.

By detaining the title deeds of the estate from the heir, or by aliening the lands assigned for her dower.

A wife levies a fine or suffers a recovery with her husband, she thereby bars herself of dower.

There are *Jointures* usually made by the husband of great estates, in lieu of dower, by virtue of the statute 27 *Hen.* 8. c. 10.

And a jointure is contrived for the wife, to take effect presently in possession or profit, after the death of the husband, for her own

(a) Except in the case of modern treasons relating to the coin.

life; and it must be made in satisfaction of her whole dower, and be so expressed; it may be also made either before or after the marriage; so it may be by devise, and she may have her choice.

In case the same be made before marriage, the wife cannot wave it and claim dower, even though she were under age at the time of marriage; but if made after marriage, it is waveable, for then she may refuse the lands appointed in jointure, at the husband's death, and have her dower.

If the wife be evicted of her jointure, she shall be endowed according to the rate of the husband's lands, whereof she was dowable at common law.

A wife, at the death of her husband, may enter on her jointure, without bringing an action; and a jointure is not forfeited by the treason of the husband, nor by adultery in her, as in cases of dower.

6. The *Estate for Life*, is where a person holds land or tenements let or granted to him for his own life, or the life of some other person (*pur autre vie*); on which lease or grant, livery of seisin is made;

This estate may be made both for a man's own, and another's life; but that for his own is greater than for another's: and it is a freehold estate, though accounted the least in the law.

If a lease be granted to a man and his assigns, to hold the land during his life, and

the lives of two other persons; he hath but one estate for his own and the other two lives, and it is good with such limitation.

But where a person grants land to one, to hold to him and also to two others for their lives, none can take but the first person, because he is only party to the deed, and the rest are only named in the *habendum*, and not the grant.

By the common law, a lease for life cannot be granted to commence at a day to come; because livery and seisin may not be made to any future estate.

Yet if after the day the lessor make livery it will be good; and a lease for life in reversion, or for years, may be made to begin at a future day.

Where a grant or lease is made for life or years, as the timber trees are annexed to the land, the lessee has only a special interest therein, to have the mast and shadow for his cattle.

And when they are severed from the lands, or blown down with the wind, the grantor or lessor shall have them as parcel of his inheritance.

But if an house, or part of it, falls down, the lessee hath an interest to take the timber to re-edify it; and every tenant for life, or years, may cut, of timber or wood upon the lands demised, necessary *house-bote*, and *plough-bote* for repairs, *fire-bote*, &c. Without doing waste.

These are called *estovers*, in the law, and

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are incident to the estates of the lessees, if no mention be made thereof in their grants.

In case any tenant for life of an estate remain beyond the seas, or elsewhere absent himself for the space of seven years together, and no sufficient proof is made of his being alive, in any action brought by the lessor or reversioner, he shall be taken as dead. 10 Car. 2. c. 6.

And by another *Statute*, if a lessee for life be not produced, on moving the lord chancellor to that purpose, and affidavit being made by those in remainder, &c. that they believe he is dead, they may enter upon the estate. 6 An. c. 18.

If a lease or grant of an estate be made for the term of one thousand years, it is only a chattel and no freehold, nor of so high a nature as an estate for life.

Tenants for life shall not be prejudiced by the sudden determination of their estate, where it is by the act of God, or the act of law, the representatives shall have the emblements, or crops sown by the tenant for life; but not when it is determined by the tenant's own act; although, even in the latter case, if the lands be in the hands of undertenants they shall not be prejudiced; and by stat. 11 Geo. 2. c. 19. the executors shall recover a proportion of the rent due from the last day of payment to that of the death of such lessor. These advantages of emblements are extended to the clergy by stat. 28 H. 8. c. 11.

7. The *Estate for Years*, is when lands or tenements are let to another person, for a certain term or number of years.

Where a tenant for life, and he in remainder, for grant an estate for years, it is the lease of the tenant for life, so long as he lives, and the confirmation of him in remainder.

And after the tenant for life's death, it will be the remainder man's lease or grant for the rest of the term.

A man having an estate for years in land, in right of his wife, makes a lease thereof to commence after his death; and then dies; though the wife survive him, this has been held good against her.

For the husband during his life might have sold the whole term which his wife had in the lands, or any part thereof; but she shall have so much as is undisposed of by him.

If the estate of lessee for years ends before corn or grain is ripe, the landlord or he in reversion will be intitled to it; but it is otherwise in case lessee for life dies, the same shall go to his executors; and if the estate of tenant at will be determined by the lessor, such tenant may have the grain. (Vide supra).

In the case of the lessee for years, it was his own folly to sow the land, when he knew his term would expire before the corn could be ripe.

A tenant for years is immediately to enter on the lands let, and he is not in possession to

bring an action of trespass, until actual entry.
(Vide Leases.)

8. The *Estate at Will*, is where lands are let to any person, to hold at the will of the lessor; or of both parties, the lessor and lessee.

In case a person enters into land with the owner's consent, he is tenant at will; so it is if a man be in possession, and has paid any rent to the landlord, although there was no agreement between the owner of the land and the tenant.

But estates at will are in general now considered as tenancies from year to year, and cannot be determined without reasonable notice to the other, which is six months at the end of the year, when the tenancy expires.

A tenant at will is not obliged to repair the premises, as the lessee for years is; though if he commits voluntary waste, an action of trespass lies against him.

If the tenant at will grants over his estate to another; or if the lessor dies, the lease will be determined.

And then if a person continues in possession, he must become tenant at *sufferance*.

To recover these the landlord is bound to make a formal entry. By stat. 4 G. 2. c. 28. tenant holding over after notice to the landlord or reversioner, is liable to pay for the time he *detains* them double the *yearly value*; and by stat. 11 Geo. 2. tenant giving notice of his intention to give up the premises, and continuing to hold over, shall be liable to pay

double rent for such time as he continues in possession.

9. The *Copyhold Estate*, that is held *Copy of Court Roll*, is an estate in lands and tenements, which tenants have had time out of mind, to them and their heirs in fee, or for lives, at the will of the lord, according to the custom of the manor.

This is called a *Base Tenure*, because in former times the copyholder held only an estate at the will of the lord, in judgment of law; but now by the custom of manors, these estates are descendible, and the heirs of the tenant shall inherit them.

Yet copyholders may not plead, or be impleaded, for any thing relating to their tenements, by the king's writ, but they are to enter a plaint in the lord's court; unless the lord pretend to expel them out of their estates.

In which case they may sue a *subpœna* out of the chancery to be relieved, or have action of trespass against the lord.

It is by surrender and admittance in the lord's court, that copyhold estates regularly pass from one to another:

A copyholder cannot transfer his interest to a stranger, in any other way than by surrender to the lord, according to the custom, to the use of him that is to have the estate.

If a man would exchange, or devise his copyhold estate, it must be done by surrender; in the latter case, to the use of his

will: and otherwise the land goes to the heir at law.

And a married woman may receive a copyhold by surrender from her husband, because she comes not in immediately by him; but on the admittance of the lord.

Upon a surrender, the person to whom made is to be admitted tenant; and the party making it continues tenant till the admittance of the surrenderee; but he cannot pass away the land or subject it to any other incumbrances, but those at the time of the surrender.

Till admittance, which is the giving of possession, the copyhold tenant hath not an estate in the lands, which he may surrender to another; except in the case of an heir by descent.

A surrender made out of the lord's court is to be presented at the next court; as if the surrenderor or surrenderee die before it is presented, in that case, a presentment afterwards makes it good.

If the tenants refuse to present at surrender thus made, they are compellable to it in the court of the lord.

There are fines payable to the lord on all admittances in fee; and on the death of a copyholder for life, a *heriot* of the best beast, or goods is due to the lord, according to custom.

And if the heir on the death of his ancestor, do not come in to be admitted, upon

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three proclamations made in court, he may forfeit his estate. But see stat. 9 G. c. 29.

By custom, the widow of a copyholder in fee may have *free bench*, after the death of her husband; and there is also a *Widow's Estate* annexed to the copyhold for life.

Though it is held, if the copyholder surrenders to the use of another, and then dies, the surrenderee shall have the land, and oust the widow of her estate.

Copyholds are not within the *Statute of jointures*, or of *uses*; nor shall be extended in execution for debt; for they are not assets to bind the heir, &c.

And yet they descend according to the rules and maxims of the common law.

"*Consuetudo Manerii et Loca.*"

Concerning Deeds and Conveyances of Lands.

1. The *Deed of Feoffment*, is a grant or conveyance of any manors, messuages, lands, or tenements, to another in *fee*; that is, to him and to his heirs for ever, by delivery of *seisin* and possession of the estate granted.

A feoffment is the most ancient conveyance of lands at common law; and is said to excel a fine and recovery, for it clears all disseisins, abatements, intrusions, and other wrongful estates.

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And which neither fine, recovery, nor bargain and sale, by deed indented and inrolled, effects.

It also bars the feoffor from all collateral benefit, in respect to conditions, powers of revocation, writs of error, &c., and destroys contingent uses.

But no deed of feoffment is good to pass an estate without livery of seisin; so that if either of the parties die before livery, the feoffment is void.

If a bargain and sale of lands be not inrolled, and the bargainor delivers livery and seisin of the land, according to the form of the deed, it has been held to be a good feoffment.

Though where one makes a feoffment, without any consideration of money, &c., by that the estate passes, but not the use, which shall descend to the feoffer's heir.

Since the statute of uses, the deed of lease and release has taken place of this deed, as it unites the use and possession, without entry. 27 H. 8. c. 10.

The terms of *parties* in deeds, are feoffor and feoffee, grantor and grantee, bargainor and bargainee, lessor and lessee, devisor and devisee, obligor and obligee, &c.

2. The *Deed of Lease and Release*, as used in our law, signifies a certain instrument in writing, for the conveyance of a man's right or interest in lands and tenements in fee to another person, who hath possession thereof.

A lease and release make but one conveyance, being in nature of one deed; and it amounts to a feoffment, the use, by operation of the statute, drawing after it the possession, and supplying the place of livery and seisin, required in that deed (a).

This deed is now the usual conveyance of lands or tenements; in the making whereof, a lease or bargain and sale for a year, bearing date the day next before the day of the date of the release, is first prepared and executed.

To the intent that by virtue thereof, and of the statute made for transferring uses into possession, the lessee may be in the actual possession of the lands, &c., intended to be granted by the release, and be thereby enabled to take a grant of the reversion and inheritance of the said lands, to him, his heirs, and assigns, for ever.

On which the release must be executed, reciting the lease or bargain and sale for a year, and declaring the use. 27 Hen. 8. c. 10.

The lease for a year, different from other leases, must have the words *bargain and sell* in consideration of a sum of money; and five shillings, though never paid, is a good consideration, whereby the lessee for a year becomes immediately in possession, on executing the deed, without any entry made.

And it is held, if only the words *demise*

(a) Invented by Serjeant Moore, although its validity was once doubted. 2 Mod. 252.

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grant, and to *farm let*, are used in the lease or bargain and sale for a year, in that case the lessee cannot accept of a release of the inheritance, until he has actually entered and is in possession.

It is proper in the lease for a year to reserve a pepper-corn rent, which is judged sufficient to raise a use; so as to make the lessee capable of a release.

The person who makes the release must not only have such an estate in himself, whereout the estate may be derived to the releasee;

But also the releasee is to have an estate in possession, that is, in deed or in law, in the land of which the release is made, as a foundation for this release, which is the object of the previous lease.

And there must be sufficient words to make the release, and to create and raise a new estate, or it will not be good.

A release made by a person, who at the time of making thereof, has no right to the lands; or if it be made to one, who at that time hath nothing in the lands, is void in law.

For he ought to have a freehold therein, or a possession or privity; and without privity between the tenant in possession and the releasor, a release will not operate.

These releases that enure by way of passing an estate, may be made upon a condition, &c., so as it be contained in the same deed, or delivered at the same time with it.

3. The conveyance by *Fine and Recovery*;

is an assurance by matter of record, and is a final agreement or conveyance, for the settling or assuring of lands or tenements, and is acknowledged in the king's court by the cognizor to be the right of the cognizee, the person to whom the acknowledgment is made.

This fine is commonly upon a feigned action on a writ of covenant, &c., and supposes some controversy, (when in fact there is none), to secure the title which a person has in his estate against all others.

Or it is to cut off intails, so that lands may with the greater certainty be conveyed, either in fee, tail, for life, or years.

And, as a fine for its better credit is supposed to be made in the presence of the king, being levied in his court of *Common Pleas*, it therefore binds married women, who are parties, and others whom the law generally disables from acting.

But where a feme covert is party, she is to be secretly examined, by the judge or commissioner that takes the fine, whether she consents freely thereto, or otherwise the fine cannot pass.

A fine is either *single* or *double*, which may be with a *render* back again of the lands; and with proclamations according to the statutes, or without them at common law; but those by statute are the best and most used.

There are likewise four sorts of fines;

1st. The fine "*sur cognizance de droit come ceo que il ad de son done,*" i. e. an ac-

of lands and tenements, and originally invented to evade the statute of mortmain.

And the end and effect of this recovery, called in the law a *common recovery*, is to destroy estates tail, remainders, and reversions, and bar the former owners thereof.

A common recovery may be with single, double, or treble voucher, and bars accordingly (a). To a recovery there must be three parties at least, the demandant, tenant, and voucher.

The *demandant* is the person or suitor in the action who brings the writ of *entry*, and therefore may be termed the *recoveror*; the tenant is he against whom the writ is brought, termed the *recoveree*; and the *vouchee* is the party whom the tenant vouches and calls to warranty for the lands demanded.

In prosecuting a recovery there is a colourable suit or action real, brought by the demandant, who is usually some friend of the person having the estate, and he, by a feigned count or declaration, pretends he was dispossessed of the land by the tenant.

Then the demandant is supposed to come into court, and this feigned tenant, if it be a single recovery, is made to appear and vouch

(a) It is so far of the nature of a fine, that it is a suit or action, actual or fictitious, upon which follows a supposed adjudication of the right, binding all persons, and vesting an absolute fee in the recoveror.

to warrant the *bag bearer* to the *custos bre-
vium*, or some officer of the court, who is
called the *common vouchee*, and is supposed
to warrant the title.

And this vouchee appears, as if he intended
to defend the same; and for that end craves
a day for making his defence, but on the day
given, he makes default, so that the plaintiff
or demandant has judgment to recover the
land against the tenant or defendant, and he
to recover in value against the common
vouchee.

On which there goes out a writ of *reisin-*
for the possession of the lands.

In case the recovery be with double or tre-
ble voucher, then by fine, *foffment*, or lease
and release, the estate must be discontinued,
and a *tenant of the freehold* made of the land;
and thereupon the practice is to bring a writ
against that tenant, and he is to vouch the
tenant in fail, and be the common vouchee.

Whereupon judgment is given for the de-
mandant against the tenant, and for the tenant
to recover in value against the vouchee, and
so the first vouchee against the second, &c.,
as the recovery is brought.

These recoveries are much favoured in
law, many of the inheritances of the kingdom
depending upon such kind of assurances;
and they suppose a recompense in value to
all persons that lost the estate: but such re-
compense in value is only imaginary, and
creates a bar to the intail for ever.

Where there is a tenant for life, with re-

mainder in tail, and remainder or reversion in fee; if the tenant for life be impleaded by agreement, and he vouches the tenant in tail, who vouches over the common vouches.

This bars the remainder or reversion in fee, though he in reversion or remainder never assented to the recovery.

But if tenant for life alone suffers a recovery, without the consent of him in remainder, it is no bar: also a recovery, though well suffered, bars only where there is a privity in law: that is the issue, and he in remainder and reversion, &c.

It shall not bar the heir, who claims as a purchaser, and not by descent; and a stranger is not barred by a recovery and non-claim, as in case of a fine.

On suffering a recovery, a person may sell and dispose of his estate as he pleases; but either a fine or recovery may be avoided on account of error, or by reason of fraud and deceit, &c.

By *statute*, recoveries are held to be good, without conveyances from lessees to make tenants to the writ of entry, &c., so as such tenants have conveyed to them an estate for life at least.

Purchasers having been in possession of the lands twenty years, may produce deeds making a tenant for suffering any recovery, and declaring the uses, which shall be allowed to be evidence of it, though not regularly entered on record.

And after that space of time, all recoveries

are deemed valid, if it appears there was a tenant to the writ, and the persons had an estate sufficient to suffer them; notwithstanding the deeds are lost. 14 G. 2. c. 20.

4. The *Deed of Bargain and Sale*, is a deed or conveyance whereby the property of lands and tenements is, for good and valuable consideration, granted and transferred from one person to another.

It is called a real contract, where a recompense is given by both the parties to the bargain; as if one bargain and sell his land to another person for money, the money, in that case, is a recompense to him for the land, and the land to the other for the money.

And if money is mentioned to be paid in a bargain and sale, and in truth none is; some authors say, it may be a good deed of bargain and sale, because no averment lies against that which is expressly affirmed in the deed; except it be questioned as fraudulent.

Yet where a deed expresses a consideration upon a purchase, others hold this will be no proof upon a trial, that the money was actually paid; but the same must be made out by witnesses.

A bargain and sale of lands in fee, is to be by deed indented and *inrolled* in one of the courts at *Westminster*, or in the county where the lands lie, before the *custos rotulorum*, and justices of peace.

And the inrolment must be made within six months after the date of the deed, to be accounted at twenty-eight days to the month.

But this extends not to bargains and sales for terms of years, &c., if they are good though not enrolled, nor by deeds indentured. 27 H. 8. c. 16. The death of either the bargainer or bargainee, before the enrolment of this deed, will not hinder the passing of the estate or rights. But the freehold is in the bargainer until it is enrolled, and therefore the bargainee may not bring action of trespass before entry had; yet it is said, he may surrender or assign his interest.

By the statute of enrolments, the estate shall not vest, except the deed be enrolled; but this being done, it settles and vests from the beginning, according to the statute of uses: the bargain first vests the use, and then the statute vests the possession.

Where a bargain and sale of land is made, it passes the freehold of the lands, and also reversions and remainders, without livery and seisin.

Though in general no person can make such deed of bargain and sale, who has not the possession of the land at the time of the sale: for if he be not in possession, nor receives the rents; to make it good, there ought to be livery, and the deed is to be sealed on the lands.

There is also a *Bargain and Sale of Goods*, which a person may at any time sell, even though an execution be coming out against him; unless there is a private trust between

the parties, and the writ of execution is delivered to the sheriff, or to some other officer.

But a sale of goods upon a Sunday will not alter the property; and a contract for the sale of goods, for 10*l.* or upwards, shall not be good, except the buyer receive part of the things sold; or gives something in earnest to bind the bargain; or some note thereof be made in writing, signed by the party, &c. 29. Car. 2. c. 3. called the statute of frauds.

An agreement for the sale of lands must be in writing, and be signed by the seller, or it will not be binding, though money be given in earnest.

On any bargain or contract, where there is not what is called *quid pro quo*; it is void in law, and termed a *nude contract* (*nudum pactum*;) but if the sum given be ever so small, the contract is good.

And if a contract or bargain be to pay money to another at a day to come, and he dies before, it shall go and be paid to his executors or administrators.

5. Deeds of Gift and Grant; a deed of gift is a conveyance or instrument, by which lands and tenements, or goods, are passed from one to another.

And a gift is of a larger extent than a grant, it being applied to things moveable and immoveable; this deed is also good, without any consideration; but, great care must be taken that there be no fraud in making it.

For if a gift and conveyance of lands be

made with intent to defraud a purchaser on good consideration, as against such purchaser it shall be deemed void.

And the parties justifying the same to be *bona fide* made, shall forfeit a year's value of the lands, &c., and be likewise imprisoned. 27 Eliz. c. 4. perpetuated by 89 Eliz. c. 18.

So it is where any deed of gift or grant is made, of lands or goods, to deceive creditors of their just debts, as to the creditors it is void in law; but not against the party himself that makes the deed, or his executors, &c.; against whom it remains good.

A general deed of gift of all a man's goods, is liable to suspicion of being fraudulent, though a true debt be owing to the party to whom made; and it is void against other creditors.

And the several marks of *fraud* in law, are; if a gift of goods be general; if the donor continues to possess and use the goods; if the deed be made in secret; or upon any implied trust and confidence; or if done whilst an action is depending.

Therefore, whenever a gift is made in satisfaction of a debt; it is proper to have it done in a public manner, before witnesses of credit; and that the goods and chattels at the same time be appraised to the full value.

In some cases, there is a *gift in law*; as where a person is made executor of a will, or marries a woman, the law, in the one case, gives him the testator's goods, and in the

other case, the goods of the wife, liable to satisfy debts.

A *Grant* is a conveyance in writing of such incorporeal things as lie in grant, and not in livery; and grants are made by persons who cannot give but by deed.

Here the things grantable are reversions, advowsons in gross, tithes, rents, services, commons, and such like, but generally we say land is granted in any deed, and the words *give* and *grant*; &c., of what lies in grant, will amount either to a gift, grant, feoffment, or release, &c., and there pass merely by delivery of the deed.

There must be a foundation of interests in grants, or they will not be good; and the law does not allow of a grant of titles only, or imperfect interests, or of rights, as are merely future.

A grant shall be taken in favour of the grantee; also the grantee himself is to take by the grant, and not a stranger: in case lands are granted by deed, the houses that stand thereon pass to the grantee.

And by the grant of all the lands, the woods will pass; but trees in boxes, &c., do not pass in such a grant, because they are separated from the freehold.

In every grant there must be a grantor or person able to grant, and a grantee capable of the thing granted, something granted which lies in grant; it is to be done in the manner the law requires, and there must be an acceptance of the grant by him to whom made.

One attainted of treason or felony, may make a grant, and it shall be good against all persons but the king, and the lord of whom the land is held; and against them not for his relief in prison.

If any grants are made by persons who have *memoria*, they are good as to themselves, but voidable by their heirs and assigns though infants, and feme covert, as not capable to be grantors, yet they may be grantees;

But subject to the disagreement of the husband to the grant made to the wife, and of the infant to his grant at his full age.

Where there appears to be uncertainty, or impossibility in grants, or when they are against law, they are judged void.

6. *A Lease of Lands, &c.*, is a demise or letting of lands or tenements to another, for term of life or years, under a *rent reserved*.

All leases that exceed three years, are to be reduced into writings; and if the substance of a lease be put in writing, and signed by the parties, though it be not sealed, it shall have the effect of a lease for years. *20 Car. 2. c. 3.*

And where a lease is sealed by the lessor, but the lessee hath not sealed the counterpart; the same is binding, so as an action of covenant may be brought against the lessor upon the lease.

If articles of agreement only are made, with covenants to make a lease for a term certain, at and under so much rent, this implies a lease, and has been so adjudged, and must

now be stamped with a lease stamp, before they can be given in evidence.

Also the words to have and possess lands in consideration of yearly rent, will make a lease of the land; and a licence to occupy and take the profits, amounts to a lease.

Leases may be made for any number of years or months, &c. But the term must have a certain commencement and determination; and if by reference to a certainty, it may be made certain, the lease will be good: "*certum est quod certum reddi potest*."

A lease is frequently granted for twenty-one years, if the lessee shall so long live; and is good, though it contains a certainty in an uncertainty.

One makes a lease from three years to three years, it is good for six years; but where a lease is made in writing for a year, and so from year to year, as long as both the lessor and lessee shall agree, this is binding but for a year.

Yet if the lessee does enter upon the second year, he thereby becomes bound to hold the land, &c., that year.

It is a maxim in law, that rent on leases must be reserved to him from whom the land moveth; as the lessor or his heirs, &c.

If a lease is made for years of lands in fee simple, rendering rent to the lessor, his executors, or assigns, during the term; the heir shall have the rent as incident to the reversion.

So where the lessor dies before the day of

payment of rent shall go to his heir; but when it grows due in the lessor's life time, it goes to his executor. *But a lessee in such case Here it is said the rent is due till the last minute of the day; for which reason, if the lessor die upon the day whereon payable, and rent is unpaid, his heir shall have it. And yet if it be paid that morning, before the lessor dies, his executors shall retain the same.*

In case a person makes a lease of lands, yielding rent at such a feast, or within one month after, and the lessor dies before the feast day and the end of the month, the rent must be paid to the heir, and not the executor; because until the month's end it was not due.

If a tenant for life dies on the day on which the rent was reserved to be paid, his executors, &c. in an action upon the lease may recover the whole rent of the year, or if he die any time before such day, a due proportion thereof. *Statute 4 G. 2. c. 19. vide supra.*

Lessees that hold over lands after the expiration of their terms, shall pay double value; and when tenant determines his tenancy by notice of his intention to quit, and holds over, he shall pay double rent. *Stat. 4 G. 2. c. 28 and 11 G. 2. c. 19.*; and when half a year's rent is due from any tenant, and no distress can be found on the lands, the lessor or landlord may serve an ejectment

on the land, and have judgment to recover, &c.

But a lessee in such case may, within six months after, file his bill in equity, and be relieved thereon. 4 G. 2. c. 28.

And if a tenant in arrear one year's rent, shall desert and leave the premises, two justices of peace, at the landlord's request, may enter upon and view the lands, &c. And if, on notice fixed by them, the tenant does not return and pay the rent, his lease shall become void. 11. G. 2. c. 12.

A person of common right may distrain for rents, though there be no cause of *distress* in the leases, so as he have the reversion of the lands.

The distress for rent is to be taken on the land chargeable therewith; and it must be made of such things whereof the sheriff may make replevin, and deliver in as good condition as at the time of the taking.

Any goods may be taken in distress, as well as cattle; another's goods in the tenant's house, and beasts of a stranger in the landlord's ground, being levant and couchant, may be likewise distrained.

For the land is debtor for the rent, and the landlord need not inquire whose cattle they are that he finds therein.

Where goods or chattels shall be distrained for rent reserved upon any lease or contract, if the goods are not replevied by the tenant within five days after such distress, and notice

thereof, they may then be appraised by two sworn appraisers, and sold by the person distraining, with the under sheriff, or constable of the place, &c.

An inventory is to be taken of the goods distrained in the presence of witnesses; and the constable, &c. must swear the appraisers, to appraise them truly (a); and the debt being satisfied by the sale, the overplus of the money, if there be any, is to be left in the constable's hands, for the owner's use. 2 W. & M. c. 5.

If any tenant fraudulently carries away his goods, to prevent a distress, the landlord within thirty days after may distrain them, wherever they are (b); and the tenant and persons assisting in the fraud, shall forfeit double the value of the goods, which may be prosecuted in a summary manner before the justices, or by action. Stat. 11 G. 2.

And where such goods are concealed in any house or place, on oath made of reasonable ground of suspicion before a justice of peace, by his warrant the house may be broken open to distrain them.

(a) And an appraisement made by the party making the distress is irregular. 1 Stark. N. P. R. 172.

(b) But in order to enable the landlord to follow them, the rent must be in arrear, and the goods have been clandestinely removed. 3 Esp. 15.

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The landlord may also distrain any cattle of the tenant's feeding on commons, or corn, grass, or fruits, growing on the lands, and cut, gather, cure, and dispose of the same, &c.

This is in case the tenant does not before pay the rent and all cost and charges. 11 G. 2. c. 19.

On a rescous of goods distrained, treble damages and costs may be recovered against the offenders, by action on the case.

And if any distress or sale be made, where no rent is due, the owner of the goods distrained may, by an action of trespass, recover of the persons distraining, double the value and full costs.

7. The *Deed of Mortgage*, is a conditional conveyance of lands or tenements, &c. as a security for money borrowed (a).

It is called *Mortgage*, because the lands are as a *dead pledge*, until the money borrowed is repaid; or for that, if the money be not

(a) A *vinum vadium*, or living pledge, is where an estate is granted to be held until the rents and profits received shall have repaid the sum borrowed, immediately on which the estate results back to the borrower. But *mortuum vadium*, or dead pledge, mortgage, is, when an estate is granted in fee, with a condition for re-entry if the borrower shall repay the sum on a certain day, and in case of non-payment the estate is absolute in the mortgagee.

paid at the day, the land dies to the debtor, and is forfeited to the creditor.

And mortgages may be made in several ways; as by lease for a long term, lease and release, or assignment, &c. but they are commonly made by lease for five hundred years, wherein a pepper-corn rent is reserved.

In which deed there is contained a *proviso* or condition, that if the money is paid at the day agreed, the deed shall cease and be void.

And here, until failure be made in payment, the mortgagor holds the lands in fee; but if failure is made, on which the mortgagee enters on the land, yet the mortgagor has an *equity of redemption*, and may call the mortgagee to an account for his receipt of the profits.

Likewise the mortgagee if he be minded to bar the equity of redemption, may call the mortgagor to account, either to pay what is due, or be foreclosed of his equity of redemption; which the court of chancery will generally order: though upon the mortgagor's paying the interest of the money, these mortgages often continue a long time after twenty years' possession by the mortgagee, the court will not permit a redemption except under special circumstances.

The right or interest in lands mortgaged is by law in the mortgagee before forfeiture; he has purchased the land as it were upon a valuable consideration, as the law will intend.

For though the mortgagor may redeem, yet it is not certainly known whether he will do so or not; and if he does not, the estate becomes absolute in the mortgagee, who is esteemed in possession on executing the mortgage: therefore if the money be not paid, whereby the same is forfeited, the mortgagee may bring an ejectment without actual entry.

As the mortgagor's heir is interested in the condition, he may pay the money, and save the forfeiture; and so may executors, &c. And it is held, that mortgages are a part of the personal estate, if it be not otherwise declared by a mortgage in fee.

The personal estate of the mortgagor shall also, in favour of the heir, be applied to pay the mortgage, where there are assets besides for the payment of all legacies.

In case lands are thrice mortgaged, it has been ruled in equity, that a third mortgagee may buy in the first incumbrance, and thereby shall hold against the second mortgagee.

But that is, unless such second mortgagee shall satisfy the money paid by the third mortgagee to the first, and also his own, which he lent on the last mortgage.

And where persons having once mortgaged lands, do mortgage the same a second time, without discovering the first mortgage, there equity of redemption will be forfeited, and the second mortgagee may redeem, &c. by *Stat. 4 W. & M. c. 16.*

When any action of *ejectment* is brought

for recovering land, &c. mortgaged, and there is no suit in equity for foreclosing or redeeming it, if the person entitled to redeem, shall, pending the action, bring the principal and interest due, with costs into court; it shall be taken as a full satisfaction of the mortgage.

And the mortgagee shall thereon be obliged to reconvey the land to the mortgagor, and deliver up all deeds.

8. The *Deed of Surrender*, is an instrument whereby a particular tenant of lands, &c. for life or years doth yield and give up his estate, to the person who has the immediate reversion or remainder, so that they may have the present possession thereof, and is directly opposite in its nature to a release.

There is likewise a surrender without deed; called a surrender *in law*; as where a person has a lease of a term, and during the term of his lease takes a new lease of the same lands, it will be a surrender in law of the former lease.

And this surrender shall take effect; though the second lease be for a less term than the first; and although it is made upon condition, or be a voidable lease, for both the leases cannot stand together in one person.

A lease is made for years, to commence at a future day, this interest may not be surrendered by deed; but if the lessee before the day does accept of a further lease of the land, thereby the first lease becomes surrendered in law;

And thus the surrender wrought by operation of law is of greater efficacy than that made by deed entered into by the party.

In the making a surrender, the surrenderor must have an estate in possession of the lands surrendered; the surrenderee is to have a higher estate in his own right than the surrenderor's estate may be admitted therein; and he must be sole seized of his estate in reversion &c.

Therefore a tenant for life cannot surrender to him, nor a tenant for years, and no delivery of seisin is necessary on account of the privacy of estate between them.

A surrender may be absolute, or conditional, and be to a use; but it cannot be made of an estate in fee, by the common law; nor may one termor regularly surrender to another.

If a lessee for life surrenders to one in remainder for years, it is void.

9. A *Will*, or *Last Will and Testament*, is a solemn instrument in writing, whereby a person declares his mind and intent, as to the disposition of his lands, goods, or other estate, or of what he would have done after his death.

In a will where lands are given, the gift is called a *devise*; but when goods and chattels are given, they are termed a *legacy*; and in a will of personal chattels, there must be an *executor* appointed, but he has nothing to do with the freehold lands: copyholds are not within the statute 29 C. 2. c. 3. but will

pass by a will sufficient to pass personally. But the testator must surrender to the use of his will.

All persons that have a sole estate in fee-simple, of any lands or tenements, may devise and give away the same by will to whom they think fit; and this extends to persons seised in coparcenary, or as tenants in common. 34 & 35 H. 8. c. 5.

Lands intailed are not devisable, only those held in fee, and goods and chattels; and wills made by infants, &c. or persons not of sound memory, are not deemed good in law; but it is said an infant of the age of fourteen may make a will of his goods or chattels.

By the statute for prevention of frauds, wills and devises of lands, &c. shall be in writing, and signed by the devisor, or some other by his express directions, in the presence of three credible witnesses. 29 C. c. 2. c. 3.

And no will made in writing shall be revoked; but by some other will that is made in writing, and of equal solemnity with the instrument it is intended to revoke, or by cancelling the same, by the testator himself, or by his direction; &c. 29 Car. 2. c. 3. perpetuated by 1 Jac. 2. c. 7. s. 5.

Where a man by will devises all his lands and tenements, all the land he hath in possession, and also in reversion do pass: though if a person having lands in fee, and other lands for years, makes such a devise of all

his lands, &c. those in fee simple only pass thereby.

It is held that lands bought after the making of a will, shall not pass by the devise of all lands and estate; whereof the testator should die possessed; for a devise of lands is not good if the devisor at that time had nothing in them.

In such a case a devise of personal things will be construed good, though the testator had them not at the time of making his will. *1 Bath. 257. pl. 16.*

There are likewise some other differences; a term may be devised by will to one for life, with a remainder to another for the residue of the term.

But a personal chattel may not be given to one during life, with remainders to others; yet the use thereof may, and the thing itself afterwards to another.

By way of future executory devise, land may be devised to an infant in *ventre de sa mere*; and be good; it is otherwise by a grant or gift, where there ought to be one of ability to have presently.

If the lands are devised by will to a person, to hold to him for ever, the devisee shall have a fee-simple; so where land is given to one to dispose of at his pleasure; or when a man devises that such a one shall be his heir, and have all his inheritance.

But if a devisee of lands be to one, without any more words; or if it is of all a man's

estate, it passeth only an estate for life, and not a fee by implication (a).

The law requires certainty in the description of persons and things in a will; and if land be given to a man who shall marry the testator's daughter, or to him and his children, &c. it is certain enough.

A condition in a will, that a woman shall not marry such a person, or without consent of another, is unlawful and void, except the portion on the marriage be limited over to some other person, who in that case may have the legacy. 5 Vin. Ab. 343 pl. 41.

If a man devise one thousand pounds to his daughter at the age of twenty-one years, and she dies before, the legacy is extinguished and gone;

But in case such legacy had been to be paid her at that age, it is then *debitum in presenti, & solvendum in futuro*, by construction of law, and the daughter's administrator, &c. shall have it on her dying before.

Yet it is said, that words in wills ought to be always construed according to the intention of the parties that make them, as near as can be collected; and the intent in a will sometimes makes estates *non est contra* the rules of law, with respect to other deeds.

(a) But words of perpetuity are not essential to a devise of the fee simple, where it appears to be the intention to dispose of all his interest in an estate. 2 T. R. 656.

No will has force till after the death of the testator; but then it gives and transfers estates, and alters the property of lands and goods, as effectually as any deed or conveyance executed in a man's life-time.

And thereby descents may be prevented, estates in fee simple, fee tail, for life or years, may be made; and he that takes lands by devise is in nature of a purchaser.

A person can make but one will to take effect; though he may make as many *codicils* as he pleases.

The last will made; or where in a will there happens to be two devises of the same thing, the last devise only stands in force: but when the testator is moved to make his will by fear or threatening, in order that he may be at quiet, &c. it may be set aside.

An *executor* of a *will* is he to whom another commits, by will, the execution of that his last will and testament; and his duty is to assent to the devise of goods, &c. and to make an *inventory* of all the goods and chattels of the testator, with their value, &c. in the presence of two legatees, or other sufficient persons.

He must then prove the will in the spiritual court, by his own oath, or by witnesses if required; and the copy thereof in parchment delivered to him under the ordinary's seal is called the *probate*.

Where the testator has goods only within one diocese, this is done in the prerogative court of that diocese; but if there be goods

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(*bona nabilia*) above 5*l.* in value in two or more dioceses, the probate shall fall within the archiepiscopal prerogative.

After this is done, the executor is to collect the debts and to pay all debts of the testator before legacies; in the following order, viz. The charges of the funeral being first satisfied; the king's debts shall be preferred; then debts on judgments, and statutes or recognizances, those due on mortgages, bonds, and other specialties, rent on leases, servants' wages, debts on shop books, &c.

And if an executor pays the debts in any other order, he is liable to the payment of any debt of a higher degree out of his own estate, by the common law.

The executor is to pay the legacies, after the debts, and he may prefer a legacy to himself; also he may pay what legacies he pleases first, or give to each legatee a part, in proportion, on there not being enough for paying every one his whole legacy.

And here the executor is not bound to order, as in the case of debts due from the testator, and no action at law can be maintained for a legacy unless he assents thereto.

After all debts and legacies are paid, he is to pay the residue to the residuary legatee, and if none, he is considered only as trustee for the next of kin, except when it is to be intended that the testator meant to give him the residue.

An *Administrator* is he who has the goods of a man dying *intestate*, without will, com-

mitted to his charge; and all such goods as come to the hands of the administrator, shall be *assets* to make him chargeable for debts to creditors, as executors are to the creditors and legatees.

The persons to whom administration is grantable by the ordinary, are as follows:

First to the husband of the wife's goods and chattels; and to the wife of the husband's goods.

If there is no husband or wife, then to the children, either sons or daughters.

In case there be no children alive, to the father or mother; after whom to a brother or sister of the whole blood or half blood.

And if there are none such, to the next of kin, as uncle, aunt, or cousin.

Lastly, to a creditor of the deceased, or any other person at the ordinary's discretion.

Where a bastard dies intestate, as he is *filius nullius*, the usual course is for some one to procure letters patent, to whom the ordinary grants administration as the appointee of the crown, and the crown reserves one-tenth, or other small proportion.

And after the administrator has paid all debts, he is to make a *distribution* of the surplusage, according to law; as, one third to the wife, and the residue equally among the children and their representatives.

Where there are no children, a moiety of the personal estate shall go to the wife, and the rest equally to the next of the kindred; and if there is no wife but children, the whole

shall be divided amongst such children; if there be neither children or wife, it shall remain to the nearest of kin in equal degree. Stat. 22 & 23 Car. 2. c. 10. perpetuated by 1 Jac. 2. c. 17. s. 5.

In case children die after their father, without wife or child, the mother, and every brother and sister, and the representatives of them, shall have equal share in their personal estates.

But no representatives are allowed after brothers and sisters' children, and those advanced in the intestate's life-time are excepted.

Though the heir at law is to have a share in the distribution. 1 Jac. 2. c. 17.

IV. *Of Moot Points or Cases.*

The word *Moot* (as derived from the Saxon, *motion*, to plead) is a term used in the *inns of court*, and signifies that exercise or arguing of cases, which young *barristers* and students have been used to perform at certain times, the better to qualify them for practice, and defence of clients' causes.

And the place where such *moot cases* were argued, was anciently called the *moot-hall*; at which time the *benchers* chose a *bailiff* of the *moots*: there was likewise an exercise termed *bolting*, which word intended a private arguing of cases.

In these exercises, two barristers sat as

judges, and three students brought each a case, out of which the judges chose one to be argued, which being done, the students first argued it, and after them the barristers.

Also there was an afternoon's exercise or *moot*, for the instruction of young barristers, called the *parcise*, bearing the same name originally with the *parvisce* in Oxford: of this Chaucer says,

*A sergeant at law that ware and wise,
That othe had taken at the parcise.*

By the ancient orders, a person could not be called to the bar, to plead causes in our courts, in less time than eight years, now reduced to seven; if they are not called *ex gratia*.

The exercises usually done by them, were twelve grand *moots*, performed in the inns of chancery, in the time of the readings, and twenty-four petty *moots* in the term times, before the readers of the respective inns.

A barrister newly called was also obliged to attend the exercise of the house the six next long vacations in lent and summer: and thereupon for those three years, he has been stiled a *vacation barrister*.

But such young counsellors and others are generally termed *utter barristers*, or pleaders *ouster* the bar, to distinguish them from the counsellors or benchers admitted to plead within the bar, as the king, queen, or prince's counsel are.

A great many of the exercises, formerly required to be performed by persons, before they were called to the bar, seemed to be, of late dispensed with, which makes their admission more easy.

All attorneys are now to serve a clerkship of five years, and be examined, sworn, and admitted by the judges in open court, and afterwards enrolled, before they shall be allowed to practise in the courts at Westminster; and if they sue out any writ, or act in those courts without being so admitted, &c. they are liable to a large penalty. See Stat. 2 G. 2. c. 23. perpetuated by 6 G. 2. c. 19. s. 75. as also where they neglect to take out the annual certificates appointed by the late stamp acts.

As they are likewise, if they do not take the oaths to the government, and shall be disabled.

And the Courts of law and equity, for the arguing, trying, and determining, all cases, and which are always attended by the ablest counsellors and pleaders, are these following.

1. The Chancery, or the High Court of Chancery, so termed, because it is the highest court of judicature in this kingdom, except that of the Parliament.

In chancery the Lord High Chancellor presides, as the chief administrator of justice next to the sovereign; and is invested with the king's absolute power governing his judgment purely by the law of nature and conscience.

There is however in the chancery an ordinary court of law, wherein issue *original writs, commissions, scire facias*, &c. for which this court is always open in vacation as well as term time; whereas other courts are confined to the term: it likewise holds plea of all personal actions, by or against any officer of the court.

But a cause cannot be tried by jury in this court: for if the parties proceed to issue, the record is to be sent into *B. R.* and tried there; after which it is remanded into chancery.

Here the extraordinary *Court of Equity*, is that wherein the lord chancellor has an unlimited jurisdiction in cases of equity, which he exercises in moderating the rigour of the law, and giving remedy by way of *bill and answer*.

It is here relief is given to infants, notwithstanding their minority; and for or against *feme coverts*; all frauds and deceits are relieved, for which there is no redress at common law; breaches of trust and confidences; and accidents, as to relieve obligors, mortgagors, &c. against penalties and forfeitures.

And this court may oblige executors to give security and pay interest for money long in their hands; order the performance of a will; decree who shall have the tuition and guardianship of children, confirm title-lands, when deeds are lost; make conveyances; deficient through mistake, good and perfect;

oblige men to come to account with each other; all questions of bankruptcy, &c.

But in suits, where the substance of them tends to the overthrow of an act of parliament, or any fundamental point of the common law; and whenever the party can have his remedy at law, he ought not to be relieved in chancery.

Also the chancery will not retain a suit generally for any thing that is under 10*l*. value, nor for lands, &c. under 40*s*. *per annum*, except it be in a case of charity.

Where there is any error in proceedings, there may be a *bill of review*, or *appeal* to the *House of Lords*.

2. The *King's Bench*, which is the supreme court of the common law, wherein the king of England formerly sat in person, and is still presumed in law to sit there, but represented by his judges. It is still considered to follow his person, and is accordingly stiled in all its processes, "the court of our lord the now king, before the king himself, wheresoever we shall then be in England."

All crimes that are against the public good; though they do not injure any particular person, are under the cognizance of this court; for it is the *custos morum* of all the subjects of the kingdom.

So that no private subject can suffer any kind of violence or injury, against his person, liberty, or possessions, but a proper remedy is here afforded him, not only for the satisfac-

tion of damages sustained, but likewise for the punishment of the offender, 2 *Hawk. Pl. Cr.* 6.

This court is now divided into *crown side*, which determines criminal matters of all kinds, wherein the king is plaintiff; as treasons, felonies, murders, robberies, breaches of the peace, and all other causes that are prosecuted by indictment, or information, &c.

And a *plea side* for trying civil causes, which holds cognizance of all actions commenced by bill or writ; as actions of debt, upon the case, trespass, ejectment, &c. against any person in the custody of the *marshall* of the court, as every one sued here is supposed to be by law, in order to give the court a jurisdiction.

The court of king's bench has power to regulate all the courts of law in the kingdom, that they do not exceed their jurisdictions, nor alter their forms, &c. It may reverse erroneous judgments given in inferior courts, and punish the magistrates and officers for corruption.

Into this court indictments from the inferior courts are frequently removed by *certiorari*; and it may award execution against persons attainted in any other courts, or even in Parliament, on removal of the record and their persons by a *habeas corpus*, *H. H. P.*

Likewise it grants *habeas corpus* to relieve persons unjustly imprisoned; and writs of *mandamus* for restoring officers of corpo-

retians, &c. as also freemen disfranchised; and from thence issues the writ *quo warranto* against those as usurp franchises and liberties against the king, to seize the liberties.

This court may commit persons to what prison they think fit; and bail any person whatsoever; it issues prohibitions to other courts; and may repeal the king's letters patent by *scire facias*, &c.

3. The *Common Pleas*, termed otherwise *Common Bench*, is one of the king's courts now held constantly in *Westminster Hall*; but in former times was moveable, and followed the king. But this court hath continued stationary ever since *Magna Carta*, which provided that "*communis placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*"

It hath jurisdiction in all causes, concerning lands and inheritances, of which fines and recoveries pass, and other actions real by original writ; and in personal and mixt actions, it hath a concurrent jurisdiction with the King's Bench.

According to Fortescue, this court seems to have been the only court for real causes; but it has no cognizance of pleas of the crown; and *common pleas* are all pleas as are not such.

And regularly it cannot hold plea in any actions, but by writ out of chancery, returnable in this court; unless it be by writ of privilege or bill for or against an officer, or other privileged person of the court.

; but the actions belonging to this court come there, either by original, arrests, and outlawries; or by privilege, or attachment; or out of inferior courts not of record, by *pone*, *returatur*, *accidit ad curiam*, *writ of false judgment*, &c.

But no persons are admitted to plead at the bar, or to sign any special pleadings in the common pleas, only serjeants at law.

4. The *Exchequer*, an ancient court of record, in which all causes concerning the rights and revenues of the crown are heard and determined, though it is accounted the last of the four courts at *Westminster*.

In the *Exchequer* there are divers courts; yet the usual division of it is in two parts only; for dispatch of business; one of which is chiefly conversant in the judicial hearing of causes, and the other called the Receipt of the *Exchequer*, employed in the receiving and payment of money.

The judicial part of the *Exchequer* is a court both of law and equity; the court of law, being held in the *Office of Pleas*, according to the course of the common law, before the barons, and where all the officers and clerks, the king's tenants and farmers, debtors and accountants, &c. are privileged to sue and be sued in like actions as in *B. R.* or *C. R.*

And the court of equity is held in the *Exchequer Chamber*, before the lord treasurer, chancellor, or under-treasurer, and barons;

but generally before the barons only, for the lord chief baron is the chief judge.

In this branch of judicature the proceedings are by English bill and answer, according to the practice of the Court of Chancery, with this difference, that the plaintiff must set forth he is debtor to the king, whether he be so or not: and the complaint is always concluded with a fiction, that he is, by the injury of the defendant, the less able to pay the king the debts which he owes him at his said exchequer.

It is in this court of equity our clergy usually exhibit bills for the recovery of their tithes, &c. The king's attorney general does also here bring bills for any matters concerning the crown; and a bill may be exhibited against the attorney general by any person grieved, in any cause prosecuted on behalf of the king, to be relieved therein.

The leading process here is writ of *sub-pœna*, or *quo minus*, which last goes into Wales, where no other process out of courts of law ought to run, except a *capias utlagatum*.

For difficult matters in law, there is a Court of *Exchequer Chamber*, where all the judges are assembled, and into which causes are adjourned, when there are two judges against two in opinion and judgment, that they cannot be determined in other courts.

5. The *Assises*, is the court where the writs and processes of *assise* are handled or

taken, before the assizes, of knights, barons, other gentlemen, with the judges on justice, in a certain place, and at a fixed appointed day.

In respect to which, all the counties in England are divided into six circuits; and two judges are commissioned to go each circuit, who hold the courts of assizes each year, in every county, except Middlesex; and the four northern counties where they are held, only once a year, but try and determine causes both civil and criminal upon dox's bill.

For by commission before said termers directed to them, and unto other gentlemen of the county, and a commission of gaol delivery, they are authorized to try and decide felonies, and every prisoner who shall be committed for any offence whatsoever, and

And by their commission yet visible they are empowered to take oaths, and to fight upon writs of *habeas corpus* brought before them by such persons as are put out or dispossessed of their lands and possessions; but this is now usually done by ejectment.

Also by commission of *nisi prius*, civil causes, drawn to issue, are brought down in the vacation, and tried at the assizes by a jury of twelve men of the county where the cause of action arises, before the day of appearance appointed for the jury above.

This is ordained for the ease of the parties, jury, and witnesses; and on return of the verdict given by the jury to the court above, the judges there give judgment.

Where causes are too difficult for the

judges of assise, they shall be referred to the justices of the bench to be ended.

6. The *County Court*: this is the chief of the *inferior courts*, and is a court kept by the sheriffs of every county, being divided into two kinds; one retaining the general name, held monthly by the sheriff or his deputy;

The other called the *Turn*, which is held but twice a year, viz. within a month after Easter and Michaelmas; and after this is the king's *Leet* through all the county, to inquire of treasons, felonies, and breaches of the peace, &c. and punish offences: It is a court of record, of which the sheriff is judge.

It is observed that before the courts of Westminster were erected, the county courts were the chief courts of the kingdom; and in former times had the cognizance of great matters, as appears by Glanvil, and other writers, till they were reduced by *Magna Charta*.

But the county court still retains the determination of certain trespasses and debts under 40s. And by virtue of a writ of *justice* the sheriff may hold plea of debt and other personal actions above that sum; for this writ is in the nature of a commission to him to do it.

By *Recordari*, &c. Causes are removed out of this court into B. R.

7. The *Court-leet*, a court of record ordained for punishment of offences against the

crown; and is said to be the most ancient court in the kingdom.

This court is incident to an hundred, as a court-baron is to a manor; and it inquires of all crimes and offences under high treason; but such as are punished with loss of life or member, are only inquirable and presentable here, and to be certified over to the justices of assise.

Anciently this court was called the *View of Frank-pledge*, because the king was there certified by the view of the steward, how many persons were within every leet, likewise persons were here bound with sureties or *pledges* for their truth.

All persons above the age of twelve years, having remained within the leet for a year and a day, may be sworn to be faithful to the king by our old laws; and the people are to be kept in peace, &c.

And every one from that age to sixty, is obliged to do suit in this court, except peers, clergymen, &c. and unless they are liable to appear at the sheriff's Turn.

The steward is the judge of the leet, which ought to be held twice every year, in like manner as the turn; but sometimes it is kept only once a year, and that by custom is good. And here the steward has power to elect officers, as constables, tithingmen, &c. as well as punish offenders.

In this court, the usual punishment is by fine and amercement; the former assessed by the steward, and the latter by the jury, being

twelve freeholders or *resiants*, and for both of which the lord may have an action of debt, or take a distress.

8. The *Court Baron*, which is a court that every lord of a manor has within his own precinct; and in ancient times, the lords of manors are stiled *barons*.

It is held by prescription, and is of two natures, viz. by the *common law*, which is the *freeholder's court*, of which the freeholders being suitors, are the judges; and by *custom*, which is called the *Customary Court*; and concerns the customary tenants and copyholders, whereof the lord or his steward is judge.

A court baron may be of this double nature, or one may be without the other.

In the freeholders court, that may be held every three weeks, they have jurisdiction in trying actions of debt, trespass, &c. under 40s. but on recovery of a debt, they cannot make execution, as other courts may, but must distrain the defendant's goods, and keep them till satisfaction is made.

It is in the customary court baron, that copyhold and customary estates are passed by surrenders, admittances, &c. But this court is usually held only once or twice a year along with the court-leet, unless it be on purpose to grant an estate, in which case it is held as often as requisite.

Here the *homage jury* of copyholders inquire that their lords lose not their services, duties, or customs, but that the tenants do

their suits of court, pay their rents and heriots, &c.

They also present the deaths of tenants, surrenders of estates, and all trespasses, &c.

By certain local acts, courts are appointed within certain limits to try, by the summary inquiry of certain householders, of the truth of pleas under 5*l.* called *Courts of Conscience*, and persons suing for such demands in the superior courts will be liable, although they succeed, to pay the defendant his costs of suit, upon a suggestion that the cause was under 5*l.*, and ought to have been tried below.

Of Actions and Suits prosecuted in the Superior Courts.

1. The *Action of Debt*, is a suit given by law where a person owes another a certain sum of money, on bond, or contract for a thing sold, which the debtor refuses to pay at the day agreed; then the creditor shall have this action against him to recover the same.

And where money is due upon any specialty, that is by deed under hand and seal, this action and no other lies, except upon covenants under seal.

Here if a person acknowledge by deed, that he has so much of another's money in his hands, an action of debt will lie for it; also where one owes money to another, who

hath his note without seal, action of debt lies on a *mutuatus*.

But the defendant may herein wage his law; which he cannot do in an action of the case, brought upon promise of payment, express or implied.

Action of debt is generally prosecuted on a bill, bond, or lease, &c. And in debt on single bill, a defendant may plead payment before the action brought, in bar thereof; and on bond, he may bring in the principal, interest, and costs, pending the action, and thereupon be discharged. 1 & 2 Ann, c. 16.

The *Action upon the Case*, is a general action that is given for redress of wrongs and consequential injuries, done without force, and which by law are not provided against.

It is said to have its name, on account of the whole cause or case being set forth in the writ; and there is no other action adapted to the case.

By statute it is ordained, that this action shall be had; rather than any persons shall depart the king's courts remediless; wherein there may be the like process, as in actions of debt or trespass. 13 Ed. 1.

In general, action on the case lies for *non-feasance* where a person omits that which he ought to do, according to promise, to the damage of another; and for *malfeasance*, when one does something which ought not to be done; and *misfeasance* where a thing is undertaken, or the law requires a person

to do it, and he doth it otherwise than he should.

The actions are as various under these heads, as the torts and injuries upon which they are founded.

For deceits, in contracts, bargains, and sales; as where one sells another adulterated wine, corn full of sand or gravel, wares by false weights or measures, &c. warrants a horse to be sound, or cloths to be of such a length, and they are not so, action upon the case will lie.

So for, any private nuisance or annoyance to a person's house, water, way, light, or air, by building, diverting, stopping, &c. whereby he is endamaged.

3. The *Action of Account*, is an action that lies against a person, who by reason of his office or business undertaken, is to render an account to another, but, refuses to do it; as a bailiff or receiver to a lord and others.

This action is now not so much used as formerly, there being no damages given by it.

4. The *Action of Covenant*, is such as is brought, where a man is bound by covenant in a deed, entered into by him and other persons, to do, or not to do, some act or thing agreed between them, when he hath broke the same.

A person makes a lease for years, and then turns the lessee out of the lands, he may have action of covenant against the lessor, though there be no express covenant in the deed.

Yet, in case a stranger enters before such lessee, he shall not have an action upon this *covenant*, because he was never a lessee in privity to have covenant.

Action of covenant lies on a bond, for it proves an agreement: though when only a bond is to a writing, and no seal thereto, covenant does not lie; but action of the case upon breach of the agreement.

5. The *Action of Detinue*, is an action that lies against one who has got goods or other things delivered to him to keep, and he afterwards refuseth to deliver them.

For any thing certain and valuable, wherein one may have property, detinue will lie; in which action the specific thing detained is generally recovered, and not damages; though if a man cannot recover the thing itself, he shall recover the value of it in damages, and also for the detainer.

If on the delivery of goods, the person to whom they are delivered dies, action of detinue may be brought against his executors, or any one to whose hands they come: and where the goods are delivered over to another, this action shall be immediately had against the second person.

And notwithstanding the party deliver the things to a person that has right to the same, yet it is said he is chargeable.

A man may likewise have a general detinue against one that finds his goods; but if, before the owner brings his action, the finder

sells them, or they are recovered in execution, &c. he cannot bring detinue. *Fitzherb.*
There is an action of detinue that lies for deeds and charters, which make the title to lands; and here the defendant shall not wage law, nor in trover and conversion, though in a common action of detinue he may do it. *2 Inst.* 107.

6. The Action of Trover and Conversion, (which comes from the French *trouver, innover*;) is a special action on the case, that lies against a person, who, having found another's goods, refuses to deliver them upon demand.

Or it is where a man has in his possession the goods of another by delivery to him, or otherwise, and the person so possessed, converts them to his own use without the owner's consent.

And this action lies for the recovery of damages to the value of the goods, &c.

It is called trover and conversion, because the plaintiff in the action surmises, that he lost such and such goods, and that the defendant found them, and at such a place converted them to his own use.

But here the losing is only a mere suggestion, and in no respect material.

If a person finds goods, and doth refuse to deliver them to the owner on demand, this is evidence of a conversion in law; yet he may answer, that he does not know whether the person demanding is the right owner or not, and then it is held to be no conversion.

Although a defendant tenders the goods or things, after a demand and refusal made, or even if they come into the plaintiff's possession, neither of these will purge the former wrong, or make satisfaction to the plaintiff for detaining of the goods.

For that shall only go in mitigation of the damages, but not to the right of the action of trover, which the party is still entitled to.

In case one puts out his cattle to pasture, and then sells them, the buyer may have action of trover against the farmer, &c. if he refuses to let them go till paid for.

Here the farmer's remedy must be had by action for what is due to him for depasturing the cattle.

And he may not detain them for the debt, as in the case of an inn keeper, or taylor, &c. for things in their custody. *Crow. Gar. 271, 272.*

7. The *Action of Slander*, is an action on the case brought for words, whereby a person is injured in his reputation.

And for any words spoken of another, which affect his life or liberty, office, trade, or tend to his loss of preferment in marriage, or service, or to his dishonour, on which occasion any particular damage, this action lies.

So it is when words are in general maliciously spoken of a person, for which, if true, such person might be punished.

But if the words are spoken in prosecuting

a cause, in an ordinary course of justice, as where a lawyer in pleading, shall utter any words according to his instructions, those words will not maintain an action.

Also, in other cases, if the defendant can make proof of the words, he may plead as a special justification, that they are true. So he may plead that he spoke them on the authority of another person whom he named at the time.

If a person be prosecuted by way of information for a libel against another, it is not material whether the matter be true or false, he shall nevertheless be punished.

Not. 253.

"Lubricum lingua non facile in posnam, &c."

8. The Action of Assault and Battery, is an action of trespass against a man's person, where any injury is done to another in a violent manner: and such offence is also indictable, though it is usual not to prosecute an indictment, but to bring this action only for damages. *Termes de Ley.*

But if a person be assaulted or beaten, and he hath no witnesses to prove the fact, the party instead of his action for the battery, may bring an information in the crown office against the aggressor, and there he shall be fined to the king. And it is held that the least touching of another person in anger, is a battery, which may be committed either by pushing, jolting, or filipping upon the

nose, &c.; and spitting in a man's face, is battery, if not done by accident.

The laying hands gently on one is not battery to found an action; the law will not presume any damage in such case, and the defendant may justify, *molliter manus imposit.*

If a person is beaten by another, he may likewise return it, and plead that the plaintiff's battery was occasioned by his own first assault, (*son assault demesne*) whereupon the defendant shall go quit, and the plaintiff be amerced.

For the battery of a person's wife, child, or servant, the husband, father, or master, shall have this action.

9. The *Action of Trespass*, is that action which generally lies for any wrong or damage done with force and arms by one private man to another; and it is sometimes against the person, and sometimes against his lands and goods.

An action of trespass lies where any one makes an entry on another's lands, and there does damage; also *trespass vi & armis* may be brought by a person who has the possession of goods, or of a house or land, if he be disturbed in his possession.

To enter into an house against the will of the owner, is a trespass for which action lies; but a man may lawfully come into the house of another, to demand money, &c. yet it has been held, that if a person has a horse in an

other man's ground, and he enters therein to take it away without leave, action of trespass lies against him.

And this action will lie for breaking a person's close or ground, or driving a cart and horses over his land, where there is no way for it; for eating corn of another with cattle, cutting of trees on the land, or damaging the grass.

So where one breaks the doors, windows, &c. of another's house, or fences of lands; or chases cattle by which means they die, or are injured; or if he fish in another's pond; or pluck up garden herbs and roots; or tear a bond, or other writing, &c.

Though if the jury do not give 40s. damage in trespass, the plaintiff shall have no more costs than damages; unless the title of the land come in question, or something of the plaintiff's be carried away, &c. Stat. 22 and 23 Car. 2. c. 9. s. 136. Or the judge will certify, that the trespass was wilful and malicious.

10. The *Action of Waste*, is an action that is brought where any waste or destruction is made either in houses, lands, or woods, &c. by tenant for life or years, to the damage of the heir, or him in reversion or remainder.

As if any such tenant pulls down his house, or willingly suffers it to fall, or to be uncovered, or in decay, and does not repair the same in due time: or,

If he cuts down timber trees on the land with an intent to sell them, or for any other

purpose but for repairs; or in case he cut young trees for reparations, when there is other timber; or green wood, if there be dry; or more fire-bole than is necessary.

Or where he ploughs up ground that time out of mind has not been ploughed, or if he plough up woodlands, convert meadow into an orchard or arable land, or arable land into meadow, or pasture into arable.

Or in case he digs mines of metal, or quarries of stone, &c. without power by express covenant, or destroys deer in a park, doves in a dove-cote, or fish in a pond, &c.

In all these cases the heir of the land, or the person in reversion, may have a writ or action of waste, and shall thereon recover the place where such waste is committed, with treble damages.

And before any waste is done, a prohibition may be had, directed to the sheriff, that he do not permit the same; or he in the remainder, &c. can have an *injunction* out of the chancery to stay the waste. *Fitzherbert*.

11. The *Action of Ejectment*, is now the common action for trial of titles, and recovering of lands, &c. illegally held and kept from the right owner.

For it is become an action in the place of many real actions, such as writs of right, *formedons*, &c. which are very difficult as well as tedious and expensive.

There is no arrest required in this action, as now generally prosecuted; but if there be not a tenant in possession, as where a

house or land is empty, and no person can be found to whom the declaration may be delivered;

In that case the plaintiff must proceed by sealing a lease upon the land, &c. And an original writ is to be sued out against the person who ejected the lessee, and then a writ of ejectment, &c.

The usual course of proceeding in ejectment is to draw a declaration only, and feign therein a lease for three, five, or seven years, by him that would try the title, and also feign a casual ejector or defendant, who serves a copy of the declaration on the tenant in possession;

And at the same time gives notice at the foot of the declaration for him to appear and defend his title, or that he the feigned defendant will suffer judgment by default, whereby the true tenant will be turned out of possession of the lands.

To this declaration, the tenant is to appear the beginning of the next term by his attorney; and consent to a rule to be made defendant instead of the casual ejector, and takes upon him the defence, wherein he must confess the fictitious lease, entry, and ouster, and at the trial stand upon the title only.

But if the tenant in possession does not appear, and enter into the said rule in time, after the declaration served, then, on affidavit being made of the service of the declaration, with the notice to appear as aforesaid, the

court will order judgment to be entered against the casual ejector by default, and thereupon the tenant by writ is turned out of his possession.

In case such tenant appears to the action, having by his attorney filed common bond, and entered into the rule aforementioned, he is made defendant in the declaration, and put into the place of the ejector.

And then the defendant's attorney must plead not guilty, and the attorney for the plaintiff draws up the issue in the case, a copy whereof, and of the declaration, is to be delivered to the attorney for the defendant, whereupon notice is given of trial.

In order to which, the writ of *venire*, &c. is to be made out and returned, and the record made up by the plaintiff's attorney, beginning with the declaration, where the first part of the cause is to be prepared, in which, after a short recital of the declaration and plea, the plaintiff's title is to be set forth from the person last seized in fee of the premises, under whom the lesser claims down to the client, the plaintiff proving the deeds, &c.

And after trial the proceedings are as in other cases.

By a late statute, those tenants to whom declarations in ejectment are delivered, for any lands, &c. are to give their landlords notice thereof on pain of forfeiting three years' rent.

And the court where such ejectment shall

be brought, may suffer the landlord to make himself defendant, by joining with the tenant, if he appears: but if he does not, judgment shall be signed.

Though in case the landlord desires to appear by himself, and consents to enter into the like rule as the tenant, if he had appeared, ought to have done; the court shall permit him so to do, and order a stay of execution, &c. 11 G. 2. c. 19. s. 13. See *ante*, *Lease and Mortgage*.

And by stat. 4 G. 2. c. 28. s. 2. where half a year's rent is in arrear, the landlord is allowed to serve a declaration in ejectment without a formal demand of the rent or re-entry.

The plaintiff in ejectment recovers only according to the right which he has at the time of bringing his action; and on his recovery by verdict, he may have an action of trespass to recover the mesne profits of the land, from the time of the defendant's entry laid in the declaration.

And if judgment should be against the plaintiff, he can bring another action of trespass and ejectment for the lands, it being only to recover possession, &c.

Also, wherever a defendant is barred in any real action concerning lands, either by judgment upon verdict, demurrer, or confession, &c. he may bring an action of a higher nature, and try the same right again, as it concerns the inheritance.

But in personal actions, as debt, &c. a bar

is perpetual, for the plaintiff cannot have this action of a higher nature, but his only remedy is by writ of assumpsit, and sometimes in the chancery.

After twenty years' adverse possession the party having a more right of possession is barred of this action, and must have recourse to some higher remedy. *Non damnabitur de rebus antiquis.*

General Proceedings in Trials of Cases in the Superior Courts.

1. The *Writ* is to be made out and sent to the sheriff, which runs in the king's name, and contains a short state of the plaintiff's demand, whether it be of lands, money, or goods, or satisfaction for injuries done, or for breaches of contract, &c. on which the defendant is summoned to appear and answer such demand.

When the writ comes to the sheriff's hands, he grants his warrant thereon to his bailiffs to execute, and if it be an action of debt, or on the case for money, sword to be above 15*l.* they arrest the defendant, and take a *bail bond* with sufficient sureties to the sheriff for the defendant's appearance, and afterwards bail is given to the action (called *bail above*) that is, to render the plaintiff in execution, or pay the damages and costs in

the action, if the verdict be against the defendant. But if the debt is under 15*l*. in that case the defendant shall not be arrested, but be served personally with a copy of the *proffess*, and notice at the bottom, to appear on the return of the writ, which if he does not in eight days, the plaintiff, by a late statute may enter a common appearance for him, and thereupon proceed in the action.

2. The *Appearance*, signifies the defendant's filing bail on any process issued out of the courts at *Westminster*; and in common bail, the sureties are nominal, as *John Doe* and *Richard Roe*. Here as a common appearance only, and not special bail is required, the party may appear in court in his proper person.

And if an attorney undertakes to appear for his client, the court will compel him thereto, and to put in common bail; after an appearance or common bail entered and filed, the plaintiff declares against the defendant.

3. The *Declaration*, is a formal setting forth in writing, the ground of complaint of the plaintiff in the action against the defendant, as the non-payment of the debt upon request, &c. And the plaintiff has two terms after the return of the writ, to exhibit his declaration, that term being accounted one wherein the writ was returnable; but in bailable actions they are reckoned from the putting in and perfecting special bail.

And if no declaration comes in before the rising of the court, the last day of the second term, the plaintiff may be nonsuited; and the defendant have costs (a).

The plaintiff's attorney is to file his warrant the term he declares; and to deliver a copy of the declaration to the defendant or his attorney, who pays 4d. per sheet for the same; and the plaintiff's attorney gives a rule for the defendant to plead by a certain day.

4. The *Plea*, is the defendant's answer to the plaintiff's declaration; though in a more extensive sense, *pleading* contains whatever either party alleges for himself in the cause depending.

A plea is either *general*, and enters into the merits of the cause, being a general answer to the declaration, as in debt on contract, that he the defendant owes nothing; or it is *special*, and sets forth the matter at large, as discharge, release, accord, and satisfaction.

The special plea is drawn up in form and signed by counsel, or it will not be received; but a general plea need not be signed by counsel: and every plea must be pleaded

(a) But where the defendant does not sign judgment *non pros* against the plaintiff for not having declared, the latter may file his declaration any time within the year, and then the defendant cannot avail himself of the former neglect.

either in bar to the action brought, or in abatement of the writ or bill on which the action is framed.

If a plea fails in answering all the plaintiff's charge or matter alleged, the plaintiff shall have judgment as for want of plea. If the plea be not a sufficient answer in law to the cause of action, the opposite party demurs, i. e. prays the judgment of the court on its sufficiency. If the ground of demurrer is apparent on the face, it is a *general demurrer*, where only informal, or rendered insufficient by extrinsic matter, such causes must be alleged, and it is then a *special demurrer*.

But when a defendant pleads a bad plea, if issue be joined thereon, and a verdict is given for the defendant, the plaintiff shall not take advantage of the insufficiency of the plea, to which he ought to have demurred.

Where process is returnable the first or second returns of terms, the defendant is to plead in four days, if he lives within twenty miles of London; and if farther off in eight days, after delivery of the declaration, with notice to plead, &c. and that without *imparlance*, or craving a further day to advise; on making default, the plaintiff may sign his judgment, by late orders of court.

The defendant having pleaded to the plaintiff's action and declaration; to such plea the plaintiff may make a *replication*, or answer; and to that there may be a *rejoinder*.

by the defendant, till the parties are at issue in the suit on some single point.

5. The *Issue*, signifies the point of matter which issues forth of the allegations and pleas of the plaintiff and defendant, which is to be tried by a jury of twelve men.

And in every issue there ought to be an affirmative on the one part, as that the defendant is indebted to the plaintiff in a certain sum, &c. And a denial on the other part, that the defendant does not owe the debt or money charged, &c.

For there must be ever a negative and affirmative of it, to make a right issue; it is also observed, that without issue joined there can be no good trial, nor ought judgment to pass.

When the parties have thus proceeded to issue, the attorney for the plaintiff makes a copy of the issue and delivers it to the defendant's attorney, with notice of trial: in order whereto, a writ of *venire facias* must be issued, and a *distringas* to the sheriff to return the jury, and the record is made up for trial.

6. The *Trial*, is the examination of the cause before a judge and jury and trying of the question or point in issue between the parties, by the facts adduced in evidence, whereupon a verdict and judgment is given.

To proceed in the trial at the *assises*, when a cause comes on, the *distringas* of the jury is to be first returned by the sheriff, and then the record must be delivered to the

judge & marshal; upon which the counsel being instructed with their briefs, &c. and all parties ready, the marshal gives the record to the judge, and the crier calls over the names of the jury.

The persons to serve on a jury, are to be freemen, and indifferent, no ways interested in the cause, and not outlawed or infamous; neither ought they to be aliens, or men attainted of any crime, or be infants, persons of seventy years of age, &c. They are likewise to have 10*l.* *per annum* freehold, and be returned from the county where the fact arises, or is alleged to have arisen in the declaration.

And to the jurors there may be a challenge, or exception taken, before they are sworn, on account of favour or affinity, or their having been convicted of felony, &c. or where any one of them has given a verdict before in the same cause, matter, or title.

After the jury are sworn, being first elected by ballot, according to the statute, they are bid to stand together, and hear their charge; on which the counsel on both sides open the case, first on the side of the plaintiff, as the proof lies on him, and looking over their briefs, they argue the matter in controversy, producing witnesses to prove what they allege.

Which *witnesses* are also to be persons of credit, disinterested, and not such as have been convicted either of felony, or perjury.

or adjudged to the pillory (a), or other infamous punishment, or persons *non amem* memories.

And when the witnesses are heard and examined, the judge sums up the evidence, and gives it in charge to the jury to do impartially therein.

If the jury do not immediately agree on their verdict, but withdraw to consider of it, then a bailiff is to keep them without meat, drink, fire or candle, and without being admitted to the speech of any, in which manner they are all kept together till they agree and bring in their verdict.

7. The *Verdict*, (*vere dictum*) is the answer that is given to the court by the jury by their foreman, concerning the matter of fact in issue in the suit committed to the trial; in which every one of the jurors must agree, otherwise it can be no verdict.

And a verdict must in all things answer the issue, or it will not be good; if the plaintiff fails to prove his issue, there the verdict ought to be found for the defendant; and no verdict can make that good, which is not so by law, of which the court is to be judge.

In case any of the jurors eat or drink, at

(a) *i. e.* For an infamous offence, for it is this and not the punishment which renders the witness incompetent.

the charge of the party for whom they give their verdict, or if either of the parties, or their attornies, do say any thing to the jury, which relates to the cause, before they are agreed on the verdict, as that it is a clear ~~cause~~, or I hope you find for such a person, &c. Or if a witness be sent for by the jury, ~~and he is gone from the bar~~, and he repeats his evidence again; in any of these cases the verdict shall be void, and set aside.

Also the jurors may be fined, for being tampered with; and an attaint will lie against a jury for giving their verdict contrary to evidence, where any corruption appears, on which, being convicted, they are liable to a very severe punishment; likewise if they take any thing to give a verdict, they shall forfeit ten times as much as taken, and be imprisoned for a year.

The jury being returned to the bar, and ready to give in their verdict, the plaintiff is then called, and if he do not appear, a non-suit shall be recorded, &c. but if he appears, the clerk of assise asks the jury who they find for, and what costs and damages, and so enters it on the panel, and repeats it to the jury which finishes the trial.

And after the trial is over, the associate delivers to the plaintiff's attorney the record with the *distringas*, and the names of the jury annexed, on the back of which he endorses the substance of the verdict, and then upon the back of the record is ingrossed the *postea*, to this effect:

That afterwards the plaintiff and defendant came before such a judge, and the jury was elected and sworn, and found such verdict and costs, &c.

This is to be carried to the clerk of the *postea* to be marked, and after delivered to the clerk of the rules, and he makes a four days' rule for judgment, (that time being allowed the defendant to move in *arrest of judgment*) and when such rule is out, if it be not arrested, the judgment is fit to be entered.

8. The *Judgment*, signifies the determination or sentence of the judges upon the suit or action tried; which, if given contrary to the verdict, will not be a good judgment.

In trials at the assises, the record is generally kept by the associate till next term, when he is to be called upon for the same, and then it is marked, and a rule taken out as aforesaid; and thereupon judgment is signed, and entered on a roll, on which a *writ of execution* is awarded, against either the body, goods, or lands, of the defendant.

9. *New Trials*, are granted in several cases; as where there was not sufficient notice given to the defendant of the former trial; or if excessive damages are assessed by the jury; or a verdict is given against evidence; or in case any fraud appear.

Though a new trial shall not be allowed for want of evidence at a former trial, which the party might then have produced.

10. *Trial at Bar*, is ordained when causes require great examination, and the trial in question is difficult or intricate, for the better satisfaction of the parties concerned.

And in order to such trials, the juries and witnesses must come to the courts at Westminster.

11. *Bill of Exceptions*, is where the plaintiff or defendant in a suit alleges any exception to the judge's opinion, which may be put down in writing, and signed by counsel, &c. and here the court above proceeds to judgment according to the exceptions tendered.

12. *Writ of Error*, is that writ which is brought by a plaintiff or defendant in any action, who is grieved by the proceedings and judgment given therein; and which any person damaged by error in a record, or who can be supposed to be injured thereby, may bring; on which the judgment may be reversed.

These writs of error are returnable from one court to another, until they come to the *Exchequer Chamber*, and lastly, to the *Lords in Parliament*, the supreme tribunal.

And thus we may observe, through the abundant care and punctuality required by law in the trial of causes, there is as much as art and conscience can contrive against corruption, and in favour of right.

V. Of Words of Arts and Terms.

Terms of the Law, are such artificial or technical words and *terms of art*, as are particularly used in and adapted to the profession of the law: and the most considerable of these relate either to writs and process of the courts, or the practice of pleading, and contain as follows:

1. *Abbroachment* is the forestalling of a market or fair, by purchasing the wares before they are therein exposed to sale, and then selling them by retail. *Termes de la Ley*, 5.

2. *Abet*, from *abettare*, to stir up or incite, signifies, in our law, as much as to encourage or set on. An abettor, therefore, is an instigator or setter-on, one that promotes or procures a crime to be committed.

3. *Abeyance* is derived from the French word *beyer*, to expect, and signifies that the fee or freehold of land is not vested in any one, but stands, in consideration of law, in waiting or expectation of an owner or proprietor; for although there be no person *in esse* in whom it can vest and abide, yet the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. The word *abeyance* hath been compared to what the civilians call *hereditatem jacentem*; for as the civilians say lands and goods do *jacere*,

so the common lawyers say that things in like estate are *in abeyance*; or, as the logicians term it, *in posse*. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis*: it remains, therefore, in waiting or *abeyance* during the life of Richard! This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance. So also when a bishop, dean, archdeacon, prebendary, parson, or any other sole corporation dies, the fee of the glebe or rectory, and the freehold of the church, whether presentative, elective, or donative, is in abeyance. So also if by act of parliament the king renounces an estate, and by the same act it is not vested in any other person, it remains in abeyance. *Co. Lit.* 342. b. 2 *Bl. Com.* 107. *Walsingham's Case*, *Plowd.* *Dallison*, 42.

4. *Abigeus* signifies a thief who has stolen many cattle. Thus, *Bracton* says, "*si quis suam surripuit fur erit, et si quis gregem abigeus erit.*" *Bract.* b. 3. c. 6.

5. *Absque Hoc*, without this, &c. are the technical words of exception made use of in pleading a *traverse*. But words equipollent may be used, and therefore a *traverse* by the words *et non* are sufficient. 1 *Saund.* 22. 5 *Co. Dig.* 109. *Mod. Cases*, 103. 1 *Lev.* 192. *Lut.* 1457. 460.

6. *Accedas ad curiam* is the name of a writ, which lies where a man hath a false judgment given against him in the hundred court or court baron; it is directed to the sheriff, and issued out of the chancery. 3 *Bl. Com.* 34.

7. *Accord*, is a word derived from the French; that signifies an agreement between two or more, where any one is injured by a trespass committed, to make recompense and satisfaction to the party grieved; and which after the accord is performed and executed, may be pleaded in bar to any action brought for the same trespass. *Termes de Ley.*

8. *Addition* signifies, in law, the adding of the estate, degree, or mystery, which any person is of, to their christian and surnames; for by the 1 *Hen.* 5. c. 5. all persons shall in law proceedings be styled by their name and addition. 1 *Bl. Com.* 406. 3 *Bl. Com.* 302.

9. *Ademption* signifies the taking away of a legacy; as if a man had bequeathed to another a bond on which money was due by a third person, and before the will takes effect he calls in the money from the obligor. *Chancery Cases, Temp. Talb.* 227.

10. *Adnichiled* is derived from the Latin word *nihil*, written of old *nichil*, and signifies, as appears by the statute 28 *Hen.* 8. annulled, cancelled, or made void. *Jacob's Law Dictionary.*

11. *Ad quod damnum* is a writ which ought to be issued before the king grants certain liberties, as a fair, market, &c, which may be

prejudicial to others, directing the sheriff to inquire what damage it may do for the king to grant such market, fair, &c. It was also the ancient method of obtaining a right to turn the course of an old road, or to make a new one; but in this respect the proceedings are now rendered more easy by the 13 Geo. 3. c. 78. s. 31. *Termes de la Ley*, 25. *Noy*, 105. *F. N. B.* 141. 225. *Vaughan*, 341. *Cro. Eliz.* 267. 1 *Co. Dig.* 302. 1 *Hawkins's Pleas of the Crown*, 369. 386.

12. *Advocati* were those persons who we now call patrons of churches.

13. *Afforors*, from the French *affier*, to affirm, are those who in court leets, upon oath, settle and moderate the fines and amerciaments imposed upon such persons as have committed faults punishable at the discretion of the court. 4 *Co. Dig.* 139.

14. *Age-prior* is, where an action is brought against an infant for lands which he hath by descent, he, by petition, plea, or motion, shews his infancy to the court, and prays that the action may stay, or, according to the more technical phrase, that *parol may demur* until his full age. *Termes de la Ley*, 30.

15. *Agent and patient* is where a person is the doer of a thing, and also the party to whom it is done. Thus, where a woman endows herself of the best part of her husband's possessions, this being the sole act of herself to herself, makes her *agent and patient*. This term is also applied to those cases where the doctrine of *remitter* prevails.

16. *Agistment*, from the French *giste*, a bed or resting place, signifies to take in and feed the cattle of strangers, at a certain rate per week. 2 *Inst.* 643. *Spelman's Glos.*

17. *Alias*, is a second writ, which issues from the courts at *Westminster*, after a first writ has been sued out and returned without any effect.

18. *Allodial* signifies an inheritance held without any acknowledgement to any lord or superior, as contra-distinguishing from an inheritance in fee, which in its general acceptation signifies land holden. In England there is no such thing as *allodial* property, for, in contemplation of law, all the lands and tenements in England, in the hands of subjects, are *holden* mediately or immediately of the king. *Wright's Tenures*, 149. *Smith's Commonwealth of England*, bk. 3. c. 10. *Cowel's Interpreter*, *Verbum Fee*. *Co. Lit.* s. 1. 2 *Inst.* 501. 4 *Inst.* 192. 2 *Bf. Com.* 105.

19. *Amenable*, from the French *amener*, to bring or lead unto, in a modern sense, signifies to be responsible, or subject to answer, a court of justice. *Cowel*.

20. *Amicus curiæ*, a friend of the court. Thus, if a judge is doubtful or mistaken in a point of law, a stranger may speak to the subject, and offer his sentiments as an *amicus curiæ*. *Co. Lit.* 178.

21. *Anatocism* signifies the taking of usurious interest for the loan of money, when the lender extorts compound interest, or joins

and accumulates together the interest of several years, and requires a new interest to be paid for them, as for the first and true principal. 1 *Postle*. 59.

22. *Apparitor* is the messenger who serves the process of the spiritual courts; to cite them to appear, to arrest them for contumacy and to execute the sentence or decree of the judges. *Ayliff's Parergon*, 70. 2 *Bulst.* 264.

23. *Apportionment* signifies the dividing of a rent into parts, according as the land out of which it issues is divided among one or more proprietors. Thus, where a lessor recovers part of the land, or enters for a forfeiture into part of the land, the rent shall be apportioned. *Co. Lit.* 148. *Moor*, 231.

24. *Approvement* is where a man hath common in the lord's waste, and the lord makes an *inclosure* of part of the waste for himself, leaving sufficient common, with egress and regress for the commoners. This right is regulated by the statute of *Merton*, 20 *Hen.* 3. c. 4. the statute of *Westminster*, 2. 13 *Edw.* 1. c. 46. 29 *G.* 2. c. 36. and 31 *G.* 2. c. 41. 1 *Ro. Ab.* 90. 405. 9 *Co.* 112. 2 *Inst.* 474. 2 *Bl. Com.* 34. 3 *Bl. Com.* 240. See the *Case of Gloter v. Lane*, *Mich.* 30 *Geo.* 3. 3 *Term Rep.* 445.

25. *Assumpsit*, from the Latin, is taken in the law for a voluntary promise, whereby a person assumes or takes upon him to perform or pay a thing: and when any one becomes legally indebted to another for goods sold, the

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law implies a promise that he will pay this debt; and if he do not, *indebitatus assumpsit*, or action on the case, lies against him.

26. *Attachment* is a custom in many places abroad, and particularly in London, whereby a creditor may attach the goods of his debtor in any hands where he findeth them, privileged persons and places only excepted.

27. *Attornment* signifies the tenant's acknowledgment of a new lord, on the sale of lands, &c. As where there is tenant for life, and he in reversion grants his right to another, it is necessary the tenant for life should agree to it, which is called *attornment*. But by the 4 Ann. c. 16. and 11 G. 2. c. 19. attornments are, in almost every case, rendered unnecessary. *Co. Lit.* 316.

28. *Average* is said to signify service which the tenant owes to his lord, by horse or carriage; but is more commonly used to signify a contribution that merchants and others make towards their losses who have their goods cast into the sea for the safeguard of the ship, or of the other goods and lives of those persons who are in the ship during a tempest. *Park's Marine Insurances*, 99. 121. 124.

29. *Averment* is, in pleading, the positive assertion of some fact, or an offer to do some act. Thus, where a man pleads a plea in abatement of the writ, or in bar of the action, which, he saith, he is ready to prove, as the court shall award; this offer to prove the plea is called an averment: "*et hoc est paratus*

verificare." 3 *Bl. Com.* 309. 4 *Bl. Comm.* 334.

30. *Audita querela*, is a writ that lies where a person has any thing to plead, but hath not a day in court for pleading it; as when one is bound in a statute or recognizance, or where judgment is given in debt, and the defendant's body in execution, then if he have a release, or other sufficient cause to be discharged from it, this writ may be granted him against the person that hath recovered.

For to writs of execution the defendant cannot plead; so that if there be any matter since the judgment, to discharge him of the execution, he shall have *audita querela*.

31. *Autre droit* is where a person does or suffers a thing in the *right of another*. Thus, executors, administrators, &c. act in *autre droit*; that is, in right of their testator or intestate, and not in their own right. 2 *Bl. Com.* 177.

32. *Badger* signifies a person who buys *corn* or *victuals* in one place, and carries them to another to sell; and make profit by them. By 5 *Eliz. c. 12.* no person shall be a *badger* unless licensed by the sessions; but by 12 *Geo. 3. c. 71.* which repeals all the acts against ingrossing, forestalling, and regrating, this character seems to be abolished. 1 *Hawk. P. C.* 482.

33. *Bar*, in a legal sense, is a plea or peremptory exception of a defendant sufficient to destroy the plaintiff's action.

34. *Base court* is any inferior court that is not of record; as the court baron, &c. *Kitchen*, 95.

35. *Beau pleader*, *pulchrè placitando*, fair pleading, is a writ upon the statute of *Marlbridge*, 52 *Hen. 3. c. 11.* to prohibit a fine that used formerly to be assessed for not pleading fairly or aptly to the purpose;—the course now being, to punish the party by making him pay the costs of improper pleadings, under an order of the court in which they are filed. *F. N. B.* 596. 2 *Inst.* 122.

36. *Besaile*, *bisayeul*, *proavus*, the father of the grandfather; and, at common law, it signifies a writ that lies where the great-grandfather was seised the day that he died, of any lands or tenements in fee simple, and after his death a stranger enters the same day and keeps out the heir. *F. N. B.* 224. and see *Booth on Real Actions*.

37. *Bona notabilia* is where a person dies, having at the time of his death goods in any other diocese, besides his goods in the diocese where he dies, amounting to the value of five pounds at least. *Perkins*, 489. 2 *Bl. Com.* 509.

38. *Calling the plaintiff* is the ceremony which takes place when a plaintiff is nonsuited. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself; whereupon the crier is ordered to call the plaintiff, and if neither he nor any one for

him appears, he is *nonsuited*, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. But this is not, like a *retraxit* or a *verdict*, a bar to another action. 3 *Bl. Com.* 296. 316. 376.

39. *Capias*, is a writ of two sorts; one before judgment, called *capias ad respondendum*, where an original is sued out, &c. to take the defendant, and make him answer the plaintiff; and the other a writ of execution, called *capias ad satisfaciendum*, which issues on a judgment obtained, and is directed to the sheriff, commanding him that he take the defendant's body, and imprison him till satisfaction be made for the debt, &c. recovered against him.

If the body of the defendant is once taken in execution upon the writ, and the writ is returned and filed, no other execution can go against his lands or goods: and by the statute 2 *G. 2.* persons charged in execution for any debt, not exceeding 100*l.* on petition to the court whence the process issued, with an account of all their estates upon oath, may be discharged out of prison, on assigning their effects to the plaintiff, unless the plaintiff chuse to allow the prisoner 4*d.* a day.

40. *Caption* is when a commission is executed, the commissioners subscribe their names to a certificate when and where the commission was executed, which in law is called a *caption*, or *taking* of thing ordered to be done.

41. *Castigatory* is the name of the instru-

another, that he shall recover the land which he the tenant holds, in prejudice to him in reversion. *Plowd.* 546. *Brownl.* 188. *Bridg.* 112. 3 *Co.* 83. *Co. Lit.* 337. 1 *Roll. Ab.* 621. 2 *Inst.* 713.

55. *Curia advisare vult* is the entry made when the court take time to deliberate upon any point of difficulty, before they give judgment in a cause. *Shepherd's Epitome*, 682.

56. *Curtilage* signifies a court-yard, back-side, or piece of ground lying near or belonging to a dwelling house; as the yard, garden, and, in short, every thing that is within the homestall or fence by which the mansion-house is surrounded. 6 *Co.* 64.

57. *Damnum absque injuria* signifies that sort of loss or damage which a man may sustain, without thereby receiving a legal injury. Thus, if a man keep a school in a particular place, and another person opens a seminary in the same place, whereby the first loses scholars that he would otherwise have had, this is to his damage, but it is not that sort of injury for which the law affords any redress; but if his rival take improper methods to draw those scholars he has already got away, an action on the case lies to recover damages for the consequential injury he may thereby receive. 3 *Salk.* 64.

58. *De bene esse* is a phrase which signifies to accept or allow any thing as well done for the present, but when it comes to be tried or more fully examined, to stand or fall according to the merit of the thing in its own

nature. Thus, on all process returnable before the last return of any term, when no affidavit is made or filed of the cause of action, the plaintiff may file or deliver a declaration *de bene esse*, or conditionally. *Cw. Elix* 68. *Loft.* 338, 2 *Term. Rep.* 719. *Mr. Tidd's Practise of the Court of King's Bench* page 232.

59. *Dedimus potestatem* is a writ or commission given to one or more private person, for speeding some act appertaining to a judge, or to some court. It is granted, most commonly, upon suggestion that the party who is to do the act is so weak that he cannot travel; as where a person lives in the country, to take an answer in chancery, to examine witnesses, to levy a fine, to swear in a justice of the peace, &c. &c. *Natura Brevium*, 65. 1 *Bl. Com.* 352, 2 *Bl. Com.* 351, 3 *Bl. Com.* 447.

60. *Demurrer*, is a term from the French and Latin, signifying a delay or stop put to any action, upon some point of difficulty, which must be determined by the court, before any further proceedings can be had in the suit: and a demurrer is said to be an issue joined on matter of law, which the judges only are to determine, or an abiding in and referring to the judgment of the court, whether the declaration or plea of the adverse party, is sufficient in law to be maintained.

And where a defendant may demur, he must do it; for if he pleads in such a case,

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he shall not afterwards take any advantage in arrest of judgment, or by writ of error, &c.

61. *Duces tecum* is a writ commanding a person to appear at a certain day in the Court of Chancery, and to bring with him such writings, evidences, or other things, as the court would view. So also, *subpoenas duces tecum* are often sued out at common law, to compel witnesses to produce on trials at nisi prius, deeds, bonds, bills, notes, books, and memorandums, in their power or custody, relating to the issue in question. But if the document required be in the power of the opposite party, or his attorney, it is usual to give them notice to produce them, and on proof of such notice, the court will, if necessary, compel the production.

62. *Elegit*, is a writ of execution that lies for one who has recovered a debt or damages, against a defendant that is not able to satisfy the same in his goods, but is possessed of lands: and this writ is directed to the sheriff to make delivery of a moiety of the party's lands, and all his goods, beasts of the plough excepted, which is done by inquest of a jury; and the creditor by virtue thereof shall hold the said moiety of the said lands so delivered to him, until his whole debt and damages are paid and satisfied.

63. *Emblements* signify properly the profits of lands sown, but the word is sometimes used more largely for any products

that arise naturally from the ground, as grass, fruit, &c. 5 Co. 116. Co. Lit. 55. 56. Cro. Eliz. 463. Cro. Car. 575.

64. *Enure* signifies, in law, to take place or be available; and is as much as *affectum*. Thus, a release made to a tenant for life, shall enure, and be of force and effect to him in reversion.

65. *Escrow* is an instrument delivered to a third person, to be the deed of the party making it upon a future condition, whenever that condition shall be performed, and then it is to be delivered to the party to whom it is made. Therefore, to deliver an *escrow*, signifies that the deed delivered shall be considered only as a *scrawl*, or writing, until the condition be performed, and then, and not till then, it shall take effect as a deed. 2 Roll. Abr. 25. Co. Lit. 31. 36. 2 Bl. Com. 387.

66. *Esplees* are the products which hereditaments, corporeal or incorporeal, yield; as the hay of meadows, the herbage of pasture, and the corn of arable lands; the rents and services of tenures, the titles in gross of advowsons, the timber and brushes of woods, the fruits of an orchard, the toll or dish service of a mill, &c. all which and such like issues, are termed *esplees*: and, in a writ of right, it must be averred, that the party claiming, or the ancestor under whom he claims, took the *esplees*; for this writ cannot be maintained without shewing actual seisin, by taking the *esplees*, either in the demandant or

his ancestor. *Termes de la Ley*, 258. *F. N. B.* 78. 459. *Co. Lit.* 52. *Daly v. King*, *Easter Term*, 28 G. 3. in *C. B. H. Black. Rep.* 1.

67. *Estovers* signify to supply with necessities, and is generally used in law for allowances of wood-made to tenants, comprehending house-bote, hedge-bote, cart-bote, plough-bote, &c. for repairs. *Bracton*, bk. 3. tract. 2. c. 18. *1 Bl. Com* 441. *1 Lev.* 6.

68. *Estreperment* is where any spoil or waste is made by a tenant on lands, to the prejudice of him in reversion; as by continual plowing and drawing away the heart of the land, and neglecting to manure it, or not using it with good husbandry, whereby it is impaired. *F. N. B.* 60.

69. *Ex mero motu* are words used in the King's Charters and Letters Patent, to signify that he grants them of his own will and motion, without petition or suggestion of any other; and the intent and effect of these words is, to bar all exceptions that might be taken to the charters or letters patent, by alleging that the king in granting them was abused or misled by false suggestions: therefore, whenever the words *ex mero motu* are used in any royal grant, they shall be taken most strongly against the king. *Kitchen*, 352. *1 Co.* 451.

70. *Ex officio* is a phrase used to signify the power which any person possesses by virtue of an office, to do certain acts of his own accord, without application to him for

the purpose. Thus, a justice of the peace may not only grant surety of the peace, upon the complaint or request of any person, but he may demand and take it *ex officio*. Thus, also, the attorney general may, by virtue of his office, file informations at the suit of the king, without applying to the court, as every other person must do, for leave so to do. Dalton, 270.

71. *Ex parte* signifies an act done or proceeding had by one party only.

72. *Ex post facto* is used in law to signify something done after another thing that was committed before. 5 Co. 22. 8 Co. 146.

73. *Extinguishment* signifies a consolidation. Thus, if a man hath a yearly rent out of lands, and afterwards purchase the land out of which the rent issues, so that he hath as good an estate in the land as he hath in the rent; the land and rent are then consolidated or united in one possessor, and therefore the rent is said to be extinguished. So also, by purchasing lands wherein a person hath common appendant, the common is extinguished. Thus, also, if *feme sole* debtee take the debtor to husband; or if there be two joint obligors in a bond, and the obligee marries one of them; in these cases the debt will be extinguished. *Termes de la Ley*. Co. Lit. 147. Vaugh. 40. Dyer, 140. 1 Co. 96. 12 Co. 81. Cro. Eliz. 594. 8 Co. 136. Plowd. 184. 1 Salk. 384.

74. *False Imprisonment*, signifies a violent trespass committed against a person, by ar-

resting and imprisoning him without just cause, contrary to law; or where one is detained in prison without legal process, or kept longer in hold than he ought, or if he be any way unlawfully detained: it is also used for a writ or action brought for such trespass, in which generally very considerable damages are recovered; for the law favours the freedom of a person from imprisonment.

75. *Feigned Issue*: If in a suit in equity any matter of fact be strongly contested, the court usually directs it to be tried by a jury; as whether A. is heir at law to B., or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried at the bar of the Court of King's Bench, or at the assizes upon a *feigned issue*. For this purpose a feigned action is brought, wherein the pretended plaintiff declares that he laid a wager of five pounds with the defendant, that A. was heir at law to B. and then averring that he is so, brings his action to recover the five pounds. The defendant allows the wager, but avers that A. is not heir at law to B. and thereupon the issue, which is directed out of the Court of Chancery to be tried, is joined. And thus the verdict of jurors in a court of law determines the fact in a court of equity. 3 *Bl. Com.* 451.

76. *Fieri Facias*, is a judicial writ that lies where a person has recovered judgment for debt or damages in the king's courts against

any one, by which the sheriff is commanded to levy the debt and damages on the defendant's goods. Upon a *faci facias* the sheriff is to use his best endeavours to levy the money on the goods and chattels of the defendant; he may sell a term for years, or ~~even~~ growing, &c. and has power to take any thing of the defendant's, except it be wearing clothes.

But the goods of a stranger, in the possession of the defendant, shall not be subject to the execution; nor may a sheriff break open the door of an house to execute this writ on the goods of the owner, &c.

77. *Filum Aquæ* is the thread or middle of the stream where a river parts two lordships. Thus, also, *file de mer* signifies the middle or high tide of the sea. 3 Mon. Angl. tom. 1. fo. 390.

78. *Flotsam* is where a ship is sunk or cast away, and the goods are floating on the sea. *Flotsam*, *jetsam*, and *ligan*, are generally mentioned together; *jetsam* being the things thrown out of a ship to prevent her sinking; and *ligan* are those goods which, so thrown overboard, sink to the bottom. *Lex Mercator*, 149. 5 Co. 106. F. N. B. 122. 1 Keble, 657. See 12 Ann. c. 18. and 26 Geo. 2. c. 19.

79. *Forma Pauperis* is where any person has just cause of suit, and is so poor that he is not worth five pounds after all his debts are paid, and excepting the property in question; on oath made of this fact, and a certificate from some lawyer, that he hath good

cause of action, the court will admit him to sue in *forma pauperis*, without paying any fees to counsel, attorney, or clerks in court. See the statutes of 11 Hen. 7, c. 12. 1 Mod. 268. 23 Hen. 8, c. 15. 2 Bl. Com. 400.

80. *Garnishment*. If an action of debt or of charter be brought against one, and the defendant saith, that they were delivered to him by the plaintiff and another person, upon certain conditions, and prays, that the other may be warned to plead with the plaintiff, the writ of *scire facias* which goes against him is called *garnishment*; and when he comes, he shall plead with the plaintiff, which is called the *interpleader*. *Termes de la Ley*, 369.

81. *Glebe* are lands of which a rector or vicar is seised *in jure ecclesia*. *Termes de la Ley*, 379.

82. *Gros Bois* is such wood which properly, in some places, either by custom or common law, signifies *timber*. 2 Inst. 642. Cro. Eliz. 1.

83. *Habere Facias Possessionem*, is a writ which lies where one has recovered a term for years in an action, in order to put him into *possession*: there is likewise a writ of this kind, commanding the sheriff to give a person *seisin* of land recovered in an *ejectment*. On these writs, the sheriff may justify breaking open the house, where entrance is denied, to deliver possession to the party recovering at law.

84. *Herbage and Pannage*. *Herbage* is

the green pasture and fruit of the earth, provided by nature for the bite or food of cattle; and *pannage* is that food which the swine feed on in the woods, as the masts of beech, acorns, &c. *Crompt. Juris.* 197. See *Dough. Rep.* 302, 304.

85. *Jocofail* is a word derived from the French *j'ai faille*, that is, *ego lapsus sum*, and signifies an oversight in pleading, or other law proceedings. By the allowance of these mistakes being found to interrupt and retard the course of justice, the legislature has, by the statutes 32 Hen. 8. c. 30., 18 Eliz. c. 14., 21 Jac. 1. c. 13., 16 & 17 Car. 2. c. 8., 4 & 5 Ann. c. 16., and 3 Geo. 1. c. 13., prevented them from taking effect whenever they are mere matter of form, after a verdict has established on which side, in the opinion of the jury, the right in question lies. 3 Bl. Com. 406. 4 Bl. Com. 369, 432.

86. *In Esse* signifies any thing in being. Things are in law distinguished into those that are *in esse*, and those that are only *in posse*. Thus, any thing that is not in actual being, but may by possibility exist, is said to be *in posse*, or *in potentia*; but what is apparent and visible is alleged to be *in esse*, or actual being. A child, for instance, before it is born is *in posse*; after it is born it is *in esse*, or actual being. *Co. Lit.* 342. *Ante*, 532.

87. *Innuendo*, is a word that was frequently used in declarations of slander and law pleadings, when they were in Latin, or

ascertaining a person or thing that was before named, or appropriating the meaning of the words spoken, to the plaintiff. Though an *innuendo* cannot make that certain, which was uncertain before; and the law will not allow words to be enlarged by *innuendo*, so as to support an action on the case for uttering them.

88. *Journeys Accounts*, is a term in our law where a writ abates by the death of the plaintiff or defendant in a cause, or for want of form, &c. in which case the plaintiff becomes intitled to have a new writ, by *journeys accounts*, that is to say, within as little time as he possibly can after the abatement of the first writ; so that the second writ shall be a continuance of the cause, as much as if the first writ had never abated.

89. *Lutit*, is a writ that issues out of the Court of King's Bench, where the defendant cannot be found in the county of Middlesex, to be taken by *bill*, but is fled into some other county, and alleged to be lurking and lying hid therein; and to the sheriff whereof this writ is directed, commanding him to apprehend the defendant there.

90. *Levant et Couchant* are terms in law for cattle that have been so long in the ground of another, that they have lain down and are risen again to feed. The usual time in which cattle are said to have been *levant et couchant*, is supposed to be a day and a night. *Termes de la Ley.* 2 Lilly, 167. *Wood's Inst.* 190. 3 Bl. Com. 239.

91. *Mainour*, in a legal sense, denotes the thing that a thief taketh away or stealeth; so that when it is said that a thief is taken in the *mainour*, it means that he is taken with the thing stolen in his hands or possession. *Plowd.* 179. 4 *Bl. Com.* 303.

92. *Negative*, is what cannot be testified or proved by witnesses in our law, only an affirmative; but if a man be accused to have been at York, and there to have done such a fact, he may prove the negative by collateral testimony, that he was at that very same time at another place, in such company.

93. *Negative Pregnant* is a term in special pleading signifying a negative proposition including an implied affirmative. Thus, if a declaration charge the defendant with having done an act on a particular day, or in a particular place, and he plead that he did not do it *modo et forma*, in the manner and form, as stated in the declaration, it may be implied affirmatively, that he did it in some other manner or form than that stated. Thus, also, if a man be charged with having aliened land, and he reply, that he hath not aliened in fee, this is a negative pregnant, for he may have aliened in tail. This mode of pleading is faulty, but there must be a special demurrer to a negative pregnant; for the court will intend every plea to be good until the contrary appear. *Dyer*, 17. pl. 95. *Kitchen*, 232. 2 *Leon.* 248. *Cro. Jac.* 559. 5 *Com. Dig.*

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94. *Nil Debet*, that he owes nothing, is the usual plea in an action of debt.

95. *Nil Dicit*, writ short; *nil dicit* signifies a failure in the defendant to put in his answer to the plaintiff's declaration, &c. by the day assigned, on which judgment of course is had against him.

96. *Nomine Pæne* is the penalty incurred for not paying rent, &c. at the day appointed by the lease or agreement for the payment thereof. *2 Lilly, 221. Hobart, 82. 8 Ann. c. 17.*

97. *Non assumpsit*, is the general plea in a personal action, whereby one denies any promise made, *modo et formâ* as the plaintiff hath alleged.

98. *Non est Capabilis*, or *Non Cul.* is an usual plea to an indictment or action of trespass.

99. *Non est Factum*, is a plea where any action is brought upon a bond, or other deed, and the defendant denies it to be his deed; which plea may be pleaded where the deed is void, or raised in a material point, or inaccurately set out.

100. *Non Pros.* is where a plaintiff in an action does not declare or proceed in a reasonable time; and a *Nolle Prosequi* may be entered by the plaintiff, if having commenced an action he will not proceed therein; or as to a part of his demand.

101. *Nonsuit*, signifies the dropping of a suit or action, and is most commonly upon the discovery of some error in the plaintiff's

proceedings, when the cause is so far proceeded in, that the jury is ready at the bar to deliver in their verdict; on his being called, and not appearing, or not prosecuting his action with effect, &c. whereupon costs are allowed to the defendant.

102. *Nude Contract* is a bare *naked contract* without a consideration; it is also called *nudum pactum*. A consideration is the material cause of every contract or agreement, or that thing in expectation of which each party is induced to give his consent to what is stipulated reciprocally between both parties. Thus, if one buy of me a house or other thing for money, and no money be paid, nor earnest given, nor day set for payment, nor the thing delivered; here no action lies for the money or the thing sold, but the owner may sell it to another if he will; for such provisions or contracts are deemed *nuda pacta*, there being no consideration or cause for them but the covenants themselves, which will not yield an action: and this agrees with the definition of *nudum pactum* as given by the civiljans, namely, *nudum pactum est ubi nulla subest causa præter conventionem*. *The Year Book*, 11 Hen. 4. pl. 33. *Plowd.* 302, 309. *Dyer*, 30. *Fitz.* "Debt," 126. *Ld. Raym.* 909. 3 *Burr.* 1663. 2 *Bl. Com.* 444. *Powel on Contracts*, vol. i. p. 330 to 344.

103. *Outlawry*, is where a person is outlawed, that is, deprived of the benefit of the law, and therefore held to be out of the king's protection; as where an original writ,

and the writs of *capias*, *alias*, and *pluries*, have been issued against him, and are returned by the sheriff *non est inventus*, and after an exigent for the sheriff to demand him at five successive county courts, and *proclamation* made for him to appear, &c.; if he omits so doing, he then becomes outlawed.

A person outlawed forfeits his goods and chattels, &c. and cannot sue in any court, only to reverse the outlawry, which he may do for error, or when the statutes relating to the same are not exactly pursued, and frequently by merely appearing.

104. *Oyer*, is where an action being brought on a deed or bond, the defendant appears and prays that *he may hear the deed* (a) on which the action is brought, and also have a copy thereof, that he may consider what to plead thereto; and the defendant is not obliged to plead without it.

105. *Paraphernalia* is derived from the Greek *παρά*, *præter*, and *δομήν*, *dos*, and signifies in law those goods which a wife challenges over and above her dower or jointure, after her husband's death: as furniture for her chamber, wearing apparel and jewels, which are not to be put into the inventory of her husband's effects. 1 *Ro. Ab.* 911. *Noy's Max.* 168. 2 *Leon.* 166. *Cro. Car.* 347. 2 *Bl. Com.* 435. 1 *Com. Dig.*

(a) So called from the proceedings being formerly *ore tenus* in the courts.

106. *Paravail*, *per avails*, signifies the lowest tenant of the fee, or he who is immediate tenant to one who holds over another; and he is called *tenant paravail*, because it is perceived that he hath *profit and avail* by the land. *F. N. B.* 135. *2 Inst.* 296. *2 Bl. Com.* 60.

107. *Peculiar* signifies a particular parish or church that hath jurisdiction within itself, and power to grant administration, probate of wills, &c. exempt from the ordinary. *Wood's Institutes*, 504. *4 Inst.* 338. *Hob.* 185. *2 Ro. Rep.* 357. *5 Mod.* 239. *3 Bl. Com.* 65.

108. *Pernancy*, from the French verb *prendre*, to take, signifies a taking or receiving; as *tithes in pernancy* are tithes taken, or that may be taken in kind. Thus, also, the person who receives or takes the profits of lands, is called the *pernor of the profits*. *1 Co.* 123. *Raym.* 17. *Co. Lit.* 589. *2 Bl. Com.* 163.

109. *Pluries*, is the name of a writ that issues after two former writs have gone out without effect.

110. *Posse Comitatus*, the power of the county, which includes the aid and attendance of all knights, and other men above the age of fifteen, within the county; but ecclesiastical persons, and such as labour under any infirmity, are not compellable to attend. This power is in the hands of the sheriffs, who may call it forth to enable them to execute the process of the law, and to do other acts for the furtherance of justice, *Lambard*, 313. *Compton*, 62. *Dalton*, c. 46. *2 Inst.*

193. 1 *Hawk*, P. C. 152. 1 *Bl. Com.* 343.
4 *Bl. Com.* 192.

111. *Possessio Fratris* is where a man hath a son and a daughter by one woman or *venter*, and a son by another woman or *venter*, and dies; if the first son enter upon the estate of his father, and die seised without issue, the daughter shall have the land as heir to her brother, although the son by the second *venter* is heir to the father; for *possessio fratris de feodo simplici facit sororem esse hæredem*; but if the eldest son die without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the land, and not the sister. *Co. Lit.* 14, 15. 3 *Co.* 42. *Cro. Car.* 347, 601. *Bracton*, bk. 2. fo. 63. *Bruton*, c. 119. *Fleta*, bk. 6. c. 1.

112. *Possibility* is defined to be, "an uncertain thing," which may or may not happen; and a possibility is either *near* or *remote*. Thus, for instance, where an estate is limited to one after the death of another, this is a *near* possibility; but a limitation to a man if he shall marry A., and after her death shall marry B., is a possibility so *remote*; that the law pays no regard to it. It was formerly held that a possibility, mere right, or *chuse in action*, could not be granted over; but it has been lately determined, that a possibility, coupled with an interest, is devisable. 2 *Lilly's Abr.* 336. 15 *Hen.* 7. pl. 10. *Hardres.* 477. 2 *Co.* 50. 4 *Co.* 66. 10 *Co.* 48. 3 *Term Rep.* 88.

113. *Postea* is a term in law signifying the return of the judge, made upon the record, of what was done in the cause after the issue between the parties is joined.

114. *Prender* is the power or right to take a thing before it is offered. *Sir John Peters' Case*, 1 Co. Rep.

115. *Privies* is a term signifying the situation of those who are partakers, or have any interest in any action or thing, or who stand in a certain relation to another. Of *privies* there are five kinds:—1. *Privies* in blood; as the *heirs*, whether general or special, to the ancestor. 2. *Privies* in representation; as the executor to the testator, or the administrator to the intestate. 3. *Privies* in estates; as joint tenants; the donor to the donee; the lessor to the lessee, &c. So if a fine be levied, the *heirs* of him who levies it are *privies*. 4. *Privies* in contract; as when the lessee assigns all his interest. 5. *Privies* of estate and contract; as when the lessee assigns his interest, and the lessor has not accepted the assignee. *F. N. B.* 117. 3 Co. 23, 123. 4 Co. 123. *Latch*, 260. 2 Bl. Com. 355. *Tidd's Practice*, p. 11, 12.

116. *Prochein Amy*, *proximus amicus*, is used in law for him who is the next friend, or next of kin to a child in his nonage, and is therefore allowed to interpose in favour of the infant in the management of his affairs. 1 Bl. Com. 464.

117. *Protestando*, in the law, is a certain form of pleading, where a defendant will not

directly affirm, nor deny, any thing that is alleged by the plaintiff, or which he himself alleges; and it is likewise when a person is to answer to two matters, and by the law he ought to plead only to one; in which case, in the first part of his plea, he shall say, *protestando, that such a matter is not true*, and then add, *pro placito dicit*, for plea saith, &c. by which means he will not be concluded by his plea, but may take issue upon the other part of the matter which he has so saved by his protest.

118. *Puis Darrein Continuance*, signifies a special plea, where some new matter is pleaded, pending an action, after the *last continuance*; as where a woman takes husband, an acquittance is given; or the plaintiff enters, &c. and this plea will be allowed at any time after issue, and before verdict.

119. *Quantum Meruit*, is a certain action of the case, brought where one employs a person to do a piece of work for him, without making any agreement about the same; in this case it is by law implied, that he must pay for the work as much as shall be reasonably demanded; that is to say, *so much as the plaintiff hath deserved (a)*.

120. *Que Estate* signifies *which estate*, and is a plea where one man intitling another to land, &c. says, that the same estate such other

(a) In case of goods sold, so much as the goods were worth "*quantum valebant*."

had, he *has* from him. Thus, in *quare impedit*, the plaintiff may allege that two persons were seised of the lands to which the advowson was appendant in fee, and presented to the church, which afterwards became void; *which estate* of the said two persons he now has, and by virtue thereof presented, &c. *Co. Lit.* 122. *1 Co.* 46. *1 Lev.* 190. *3 Lev.* 19. *Lutw.* 81. *1 Mod.* 232. *2 Mul.* 114. *3 Mod.* 52. *Cro. Jac.* 673.

121. *Quoad Hoc* is often used in law pleadings and arguments to signify, *as to the thing named the law is so, and so, &c.*

122. *Reglity* is the abstract of *real*, as distinguished from *personality*.

123. *Recoupe* signifies the keeping back or stopping something which is due, and in law it is used for *default* or *discount*. Thus, if a person hath a rent of ten pounds issuing out of certain lands, and he disseises the tenant of the land, if the disseisee recover the land and damages, the disseisor shall *recoupe* the rent in damages. *Termes de la Ley*, *Dyer*, 2. *1 Cra.* 196.

124. *Respondeas Ouster*, signifies to answer over in an action to the merits of the cause, &c. as where, on a dilatory plea; or there is a demurrer to the plea, and it is adjudged against the defendant, &c.

125. *Scilicet*, an adverb, signifying *that is to say, to wit*. It is not a direct and separate clause, nor a direct and entire clause, but *intermedia*: neither is it a substantive clause

of itself, but is made use of to usher in the sentence of another, and to particularize that which was too general before, or to explain that which was doubtful and obscure. But it must neither increase nor diminish, for it gives nothing of itself. It may, however, make a restriction, where the precedent words are not so very express but that they may be restrained. See *Lord Hobart's Reports*, 171, 172. *Poph.* 201, 204. *Cow. Jac.* 618.

126. *Scire Facias*, is a judicial writ that lies, in divers cases, but is most usually issued to call a person to shew cause to the court whence it goes out, why execution of a judgment passed should not issue; as where a plaintiff has recovered debt or damages in a court of record, and does not take out execution within a year and a day after judgment recovered; in that case there must be a *scire facias* to revive the judgment; before the plaintiff shall have execution, *in re*.

And where a plaintiff or defendant dies, execution may not be sued out on a judgment until the writ of *scire facias* is brought, and judgment given thereupon; so it is when judgment is recovered against a feme sole, who afterwards marries, the husband must be summoned to shew cause why the execution should not be awarded against him, 2 *Lil. tit. Sci. fa.*

On judgment being obtained against a testator, a *sci. fa.* issues against the executor, though within a year after the judgment had;

for in these cases, where the person is altered, there is to be a new judgment to warrant the execution.

This writ may be likewise brought against bail, where the principal is not to be found, or does not surrender himself. And there is a *scire facias* to hear errors, as also upon a recognizance in chancery, to extend lands, &c.

127. *Si Actioem*, is the Latin conclusion of a plea to the action brought; as where a defendant demands judgment, if the plaintiff ought to have or maintain his action, there-
of, &c.

128. *Solut ad Diem*, is a plea to an action of debt upon a bond or penal bill, &c. whereby it is alleged that the money was paid at the day appointed.

129. *Statutes of Jeofails*, are those that help drives defects in pleadings, after verdict given; for it is ordained, that judgment shall be had in any suit after an issue is tried, notwithstanding there may be any Jeofail or mispleading.

130. *Aut valet*, is where one thing amounts to another, and then it is all one as if it were the same. Thus, a lease and release amount to a feoffment. Sheppard's Epitome, 1130.

131. *Writ of Habeas Corpus*, is a writ that lies where a defendant in an action cannot be arrested upon a *capias* in the county where the action is laid; and thereupon that writ is returned *non est* (not found) by the sheriff, and it is so

testified, in which case a *testatum* writ may be sent out into any other county where the defendant is supposed to be, or to have wherewith to satisfy.

132. *Traverse*, is a word or term taken from the French, and, as used in the law, signifies to deny a thing alleged in a declaration or pleadings, &c. And a defendant's plea is deemed ill, wherein the plaintiff's title, &c. is neither traversed and denied, nor confessed and avoided; but although each matter of fact pleaded by the plaintiff may be traversed, yet no matter of law may be so; nor may a record, which is not to be tried by jury. The formal words of a traverse are, *without this*, that, in Latin, *absque hoc*, &c.

133. *Variance* signifies any alteration of a thing before said in a plea, or where a declaration in a cause differs from the writ, or from the deed on which it is founded. 2 *Lilly*, 629. *Cro. Jac.* 479.

134. *View*, is generally where a real action is brought, and the tenant does not certainly know what land it is the demandant requires; then he may pray the jury may *view* or see the land, &c. that is claimed: in which case a special writ of *distringas* issues, directed to the sheriff, commanding him to have six of the jury, or a greater number of them, at the place in question, some convenient time before the trial, who shall have the whole thing in dispute shewn to them by

two persons named in the said writ, and by the court appointed. For the present practice concerning views are fully settled in *Hil. Term*, 30 G. 2. See *Bar. Rep.* 252, &c.

135. *Venire facias*, is a judicial writ, whereby the sheriff is commanded to cause a jury to appear, upon a cause brought to issue, in order to try the same; and on which writ, if the jury do not appear at the day of the return of it, then a *habeas corpora* shall go out, and afterwards a *distress* until they do appear (a).

136. *Voire dire*, is a French term, used where there is a busy evidence, not otherwise to be excepted against, and it is prayed upon a trial at law, that the witness may speak the truth on oath, whether he shall be a gainer or loser, by the matter in controversy; and if it appears he is unconcerned, his testimony is allowed, otherwise it is not.

137. *Uncore Prist*, is the plea of a defendant who is sued for debt due on bond at a day past, wherein he says, that he tendered the money at the time and place, and that there was none there to receive it; and that he is still ready to pay the same; which plea saves the penalty of the obligation. And so in case of any other tender of payment.

(a) The *distringas* is now for the sake of dispatch the first process.

256 *Of Fictions and Intendments, &c.*

138. *Wager of Law*, is where an action of debt is brought against one, upon a simple contract, without either deed or record; and the defendant, in the presence of compurgators, swears in court, that he owes the plaintiff nothing, in manner and form as he has declared; and here wager of law hath been allowed, because the defendant may have paid the plaintiff his debt in private, or before witnesses who may be all dead, and therefore the law allows him to wage his law in his discharge, rather than it will suffer him to be charged by the bare allegation of the plaintiff.

This ancient practice of waging law is now much disused, since actions of debt are turned into actions upon the case, by which means the defendant is ousted of his wager of law. And hence, as an executor cannot swear for his testator, and so cannot wage his law, no action of debt on a simple contract can be maintained against him.

VI. *Of Fictions, Intendments, and Presumptions.*

1. A *Fiction*, or feigned construction of the law, is when, in a colourable way, the law construeth a thing otherwise than it is in truth: and therefore *fictions* were formerly termed an *abuse* of our law; but have been a long time

thought necessary, and allowed of in several cases.

As a common recovery is *fiction juris*, or a formal device for the docking of an estate-tail, &c. that was contrived, when those estates came to be inconvenient, and could not be altered for any good purpose.

The seisin of the conusee in a fine, is also but a *fiction* of law, it being only an invented form of conveyance to pass estates; and in the action of ejectment, there is both a fictitious lease, entry, and ouster, to try the title, and a feigned casual ejector.

Likewise, if a bond is made at a place beyond sea, it may be pleaded to have been made in Islington, in the county of Middlesex, or elsewhere, by fiction of law, in order to try the same here, &c., for *debitus et contractus sunt nullius loci*. *Co. Lit.* 261. b.

But the law ought not in any case to allow of fictions, where it may be otherwise really satisfied; and there is to be equity and possibility in every legal fiction.

And it is observed, that no fiction should unlawfully work any damage, or injury to another.

2. *Intendment*, in our law, signifies the understanding, intention, and true meaning, of a thing, which supplies what is not fully expressed or apparent.

So that where a thing is doubtful, intendment may make it out; likewise many things shall be intended after a verdict, in a cause; but intendment cannot supply the want of

258. *Of Fictions and Intendments, &c.*

certainty in a charge laid in an indictment for any crime, &c. which must be expressly found. 2 *Hawk. Pl. Cr.* 227.

A thing may be necessarily intended by something that goes before or follows it; and where, in a suit, an indifferent construction may bear two intendments, it is a rule in law to take it most strongly against the plaintiff.

In case a person be bound by bond to another, and it is not expressed to whom the money shall be paid, or even if said to the obligor, the law will intend it to be payable to the obligee, who lent it.

And where no time of payment is limited, the law intends that the money is to be paid within a reasonable time. 2 *Lilly*.

In deeds and contracts, the intent of parties is much regarded by the law; yet it shall not take place against the direct rules of law; and in conveyances of estates, our law does not admit them regularly to pass by intendment and implication.

Though in devises of lands, they are allowed with due restrictions, that is to say, where the devisee must necessarily have the thing devised by the will and no other person whatsoever can have it. *Vaugh. Rep.* 261. &c.

No intendment or implication shall be allowed against an estate limited by express words, to defeat the same.

3. *Presumption*, denotes in law an opinion

or belief of things, so strong as to amount to proof and evidence thereof.

Where all the witnesses to a deed of feoffment, or other conveyance of lands, are dead, there continual and quiet possession is violent presumption, which stands for a proof.

If where a defendant pleads payment to a bond, the debt appears by the bond to have been of a very long standing, and no demand can be proved to have been made, nor interest paid for many years; it shall be presumed that the bond is paid, though the plaintiff has it in his custody. See 2 *Stra.* 826. 2 *Ld. Raym.* 1370. 8 *Mod.* 278. (a)

Also if rent be in arrear for twenty years or upwards, and the landlord does give a receipt for the last year's rent due, it is in our law presumed that all the rest is satisfied. 12 *Vin. Abr.* 129. *Gilb. Law. Evid. Tri per Pais* (Edit. 1739.) 418. *Law Evid.* (Edit. 1739.) 196. pl. 13. *Noy's Max.* 15.

And so in some other instances, though presumption is what may be doubted of, yet it shall be accounted true, if the contrary be not proved.

In a criminal case, if a person is found killed in a house, and at the same time a man is seen to come out there with a bloody sword or knife, and no other person was then in the house; this is a violent presumption

(a) Twenty years is considered presumptive evidence that a bond has been satisfied.

200 *Of Fictions and Intendments, &c.*

which will be admitted for evidence, that that man was the murderer. But such circumstances are always for the jury to decide upon.

But here a precaution is given that on such presumptive or circumstantial evidence without other proof by witnesses, the court ought not to judge hastily. See 3 *Inst.* 232. *H. H. P. C.* 635, 636. 2 *H. H. P. C.* 290.

THE END.

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